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Supreme Court of the United States

OCTOBER TERM, 19

No. 355

PAN ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

versus

O Y FINLAYSON-FORSSA A B; FINSKA SJOFORSAKRINGS AKTIESBOLAGET, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Pan-Atlantic Steamship Corporation, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, reversing a decree in admiralty rendered by the United States District Court for the Eastern District of Louisiana in Petitioner's favor.

OPINIONS BELOW

The findings of fact and conclusions of law constituting the opinion of the District Court (R. 930) printed in Appendix B hereto (p. 18), are reported in 156 F. Supp. 414. The opinion of the Court of Appeals (R. 949) printed in Appendix C hereto (p. 33) is reported in 259 F. 2d 11.

JURISDICTION

The judgment of the court of Appeals for the Fifth Circuit was entered on August 1, 1958 (R. 973), and is printed in Appendix D hereto (p. 53). The Court of Appeals by order dated August 14, 1958, granted to petitioner an extension up to and including the 22d day of September 1958 within which to apply for a rehearing and stayed the issuance of its mandate accordingly and if a rehearing was applied for and denied, it stayed its mandate for ten (10) days following any such denial (R. 976). On September 19, 1958, petitioner presented to and filed with the Court of Appeals a petition for rehearing *en banc* (R. 977) which remained under consideration for almost nine months, ultimately being denied without opinion on June 9, 1959 (R. 985). Thereafter on June 12, 1959, Petitioner filed with the Court of Appeals an application for a stay of mandate for a period of ninety (90) days within which to make application to this Honorable Court for a writ of certiorari (R. 986), and by order dated June 18, 1959, the Court of Appeals granted such a stay of mandate for ninety (90) days from date of such order (R. 988), which order is printed in Appendix E hereof (p. 54).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the **speed through the water** of vessels navigating the Mississippi and similar rivers, which are well known to have strong currents, is the sole relevant speed to be considered in applying the Rules of Navigation, as was held by the Court of Appeals in finding Petitioner's vessel guilty of contributing fault in this case?

2. Whether a vessel maneuvering in a fog in a river

such as the Mississippi, which has a well known strong current and countless curves, bends, bars, shoals and other obstacles, must plan her maneuvers **exclusively** with respect to an unseen, unheard and unknown vessel approaching at an admittedly grossly excessive speed downstream with the current, rather than have the right to plan her maneuvers with the expectation that any such other vessel would be obeying the Rules of Navigation as to speed, fog signals and otherwise?

3. Whether the "rule of sight" test requiring a vessel in fog to proceed at such speed that she can come to a stop within "one-half" the limit of her visibility is applicable so as to require such vessel to become adrift with the current in order to avoid being held partly at fault for a collision with an unseen, unheard and unknown vessel approaching at an admittedly grossly excessive speed downstream with the current?

STATUTES INVOLVED

The statute involved is Rule No. 16 of the Inland Rules of Navigation, 33 U.S.C. Section 192, printed in Appendix F hereto (p. 56).[1] Certain Regulations referred to as contrary to the holding herein of the Court of Appeals are involved and are those of the Corps of Engineers, U. S. Army, regulating Navigation in the Mississippi River, 33 C.F.R. § 202.195(b), printed in Appendix G hereto (p. 56), and of the U. S. Coast Guard, The St. Marys River Rules, 33 C.F.R. §§ 92.23(b), 92.49(a), 92.49(h), printed in Appendix H hereto (p. 57).

[1] This rule is practically identical to Rule No. 16 of the International Rules, 33 U.S.C. 145n.

STATEMENT

The basis of federal jurisdiction in the court of first instance, the United States District Court for the Eastern District of Louisiana, is that this is a case of admiralty and maritime jurisdiction under 28 U.S.C. § 1333 (1).

This case involves the question of fault and liability of two vessels, the American Steamship ANTINOUS and the Danish Motor Vessel ARGENTINA, arising out of a collision between them at about 2:00 A.M. on April 10, 1952, which occurred in fog in the Mississippi River about one-half mile above Scarsdale Light, about 20 miles below New Orleans, and less than one-half ship's length (within 150 feet) off the East (right ascending) bank of the river [Finding of Fact XXX, R. 942, Appendix B (p. 29), also R. 951, Appendix C (p. 35)]. The ANTINOUS (whose interests are here represented by Petitioner) was ascending the river bound for New Orleans and the ARGENTINA was descending the river outward bound from New Orleans to sea. The ANTINOUS was but slightly damaged, while both the ARGENTINA and her cargo sustained severe damage.

The Respondents here, O Y Finlayson-Forssa A B/ Finska Sjoforsakrings Aktiebolaget, et al, as owners, insurers or notify parties, of such damaged cargo aboard the ARGENTINA, on April 9, 1953, filed a libel in the United States District Court for the Eastern District of Louisiana in admiralty *in rem* against the steamship ANTINOUS for $450,000.00 (R. 2); the ARGENTINA not being sued by its own cargo because it is relieved of direct liability thereto resulting from neglect or default in the navigation of the ship by the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300, 1304. Thereupon the Pan-Atlantic Steamship Corporation, Petitioner here-

in, claimed the ANTINOUS as owner (R. 13) and on August 31, 1953, filed its answer to said libel denying all liability for said collision (R. 24) and at the same time filed a petition under the 56th. Admiralty Rule of this Court against the Motor Vessel ARGENTINA, alleging that the faults and negligence of the ARGENTINA were the sole cause of the collision and impleading the ARGENTINA to defend and possibly respond to half damages in the event cargo should obtain a decree against the ANTINOUS under its libel (R. 14). On September 2, 1953, Det Forenede Damskibs-Selskab, A S, a Danish corporation, claimed the ARGENTINA as owner (R. 32) and on September 21, 1953, filed its answers to the original libel of cargo (Respondents here) (R. 38) and to the petition of impleader of Pan-Atlantic Steamship Corporation, owner of the ANTINOUS (R. 33). In both answers the ARGENTINA owners **admitted** the collision and resulting damages were caused solely by the negligence of the ARGENTINA and were not caused or contributed to by the ANTINOUS (R. 34, 35, 39, 40). In the meantime, on August 20, 1953, the Proctors for the two vessels had entered into an agreement by which the ARGENTINA owners had so **admitted** that the collision was due solely to the fault of the ARGENTINA and that the ANTINOUS was free from fault, and upon the remote possibility that cargo might obtain a decree against the ANTINOUS, a method of settlement of the damages to be borne by the respective vessels was agreed upon.*

After a four-day trial in which the facts of the case were fully brought forth, the District Court held the ARGENTINA solely at fault and completely exonerated

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* Agreement filed by Petitioner in evidence (R. 430) and certified copy filed herein as Supplemental Transcript of Record.

the ANTINOUS [R. 923, 942, Appendices A (p. 17) and B (p. 18) hereto]. All of the facts concerning the navigation of the two vessels leading up to and at the time of the collision were found and set forth in detail by the District Court in thirty separate Findings of Fact [R. 930, Appendix B (p. 18)].

The Court of Appeals, after stating that it accepted all of the facts so found by the District Court as a basis for its decision [R. 950, 951, 969, Appendix C (p. 35)], arrived at an entirely different conclusion from that Court and held the ANTINOUS also at fault along with the admittedly guilty ARGENTINA [R. 949, 973, Appendices C (p. 33) and D (p. 53) hereto]...

Consequently, there is no issue as to the facts material to the consideration of the questions here presented for review. Suffice it to say that it was found below that the ARGENTINA was proceeding on an improper course downstream at a reckless speed in fog without sounding proper fog signals and without heeding those she acknowledged having heard from the ANTINOUS [R. 939, 940, 943, Appendix B hereto (pp. 26, 27, 30), see R. 957, Appendix C (p. 40)]. The ARGENTINA had radar; the ANTINOUS did not. The District Court found the ARGENTINA was still proceeding at the time of the collision 3 or 4 knots through the water, and with the current was making not less than 6 or 7 knots over the ground [Finding XXVII, R. 941, Appendix B (p. 28)]. Both courts found the ARGENTINA would have shortly struck the east bank if she had not collided with the ANTINOUS [Finding XXVII, R. 941, Appendix B (p. 28), and R. 952, Appendix C (p. 36)]. The District Court found that prior to the collision, the ANTINOUS had stopped her headway through the water and had commenced going astern slowly [Finding XIV, R. 936, Ap-

pendix B (p. 24)]. This latter was a definite finding of fact with substantial weight of evidence supporting it and which the Court of Appeals accepted, but accepted with some doubt without pointing to any evidence or proof in the Record to the contrary [R. 969, Appendix C hereto (p. 51)].

REASONS FOR GRANTING THE WRIT

1. The basic ground upon which the Court of Appeals reversed the District Court was its legal conclusion that the speed of the ANTINOUS prior to the collision was immoderate as measured in terms of her rate of movement **through the water.** The Court held that the vessel's rate of movement **over the ground was immaterial** in determining whether her speed was moderate [R. 957, 968, Appendix C (pp. 40, 50)]. The District Court, in considering whether the ANTINOUS was proceeding at a moderate speed in the fog, deducted from her theoretical speed through the water a substantial portion of the effect of the gravity current of the river, which it found to be not less than four (4) knots (Finding III; R. 932, Appendix B (p. 20)].

This holding and decision of the Court of Appeals is in direct conflict with the decision of this Court in *The Victory-The Plymouthian*, 168 U.S. 410, at 422 and 424 (1897). There this Court in considering the speeds of vessels approaching each other deliberately added and deducted the force of the tide to and from the speeds through the water of both vessels in order to find the relevant speed "over the ground".

The ruling of the Fifth Circuit is in conflict with its own prior decisions (which it did not undertake to overrule) concerning navigation in the Mississippi River

and other rivers and channels, where it has repeatedly referred to as relevant the speeds over the ground or bottom, rather than only to speeds through the water (*Societa Anonima Navigazione Alta Italia v. Oil Transport Company, Inc.*, 232 F. 2d 422, 425 (5 C.A.—1956); *Socony-Vacuum Oil Co. Inc. v. Smith*, 179 F. 2d 672, 674 (5 C.A.—1950); *Nederlandsche Indische Tankstoomboot Maats, et al v. Standard Oil Co. (N.J.) et al (The Silvanus)*, 66 F. 2d 113, 115 (5 C.A.—1933). See also to same effect decisions of District Courts—*The Silvanus*, 56 F. 2d 257, 258 (E.D. La.—1932), aff'd. 66 F. 2d 113; *Panama Transport Co. v. United States*, 102 F. Supp. 958, 960 (S.D. N.Y.—1951); *The Kersten Miles*, 52 F. 2d 502, (S.D. Tex.—1931).

The holding is in conflict with duly promulgated governmental regulations of the Corps of Engineers, U. S. Army, and the United States Coast Guard, which have the effect of statute, and which, in regulating speeds in rivers, refer to the speeds "over the bed of the river" and "over the ground". (See Appendices G & H hereto (pp. 56 & 57).

It is elemental that there are and always will be collision situations where **speeds through the water** are the only relevant speeds to be considered. Such situations exist when the current is acting on both vessels **with the same resulting effect.** For example, if two vessels are approaching each other while crossing from one bank of the river to the other; both vessels would be set down-stream by the current at the same rate so that their positions with respect to each other would be governed by their respective speeds (and courses) through the water; or if one vessel is overtaking another, whether going up-stream or down, the effect of the current on each is the same. But when the resulting effect of the

current on one vessel is substantially different (or exactly opposite as in the instant case) there is no field of operation for the fiction that speed through the water should be employed to the exclusion of speed over the ground. The Trial Court, aware of the strength of the current, correctly surmised that, in the case of a vessel stemming the current and making half speed through the water but only slightly more than steerage-way over the ground, the moderateness of her speed should not be measured in relation to her speed through the water or at least not entirely in relation to her speed through the water.

That this holding of the Court of Appeals results in impossible navigational requirements is shown by the corollary which the holding itself created. The inevitable corollary is that the speed of the ANTINOUS should not have exceeded 3.1 knots through the water [R. 971, Appendix C (p. 52)]. With the admitted four or more knot current in the river which the ANTINOUS was stemming (see footnote 3), the mandatory maximum speed fixed by the Court would have resulted in the ANTINOUS being **swept down river** by the force of the current at a speed of .9 knots. In other words, it was **unlawful** (and contributing fault) under the decision, for the vessel to proceed at **any** speed at which she could make headway, even though it was found that the circumstances were such she should not have anchored in that portion of the river[4] [Finding of Fact V, R. 933, 934, Conclusion of Law V, R. 944, (Appendix B (pp. 21 & 31)]. This points up another equally shocking corollary: she was condemned if she did (make headway against the current), and condemned if she didn't (be-

[3] "The average current in the river was no less than four knots with the current in the bends being somewhat greater." [Finding III, R. 932, Appendix B (p. 20)]. This Finding was accepted by the Court of Appeals [R. 951, Appendix C (p. 35)].

[4] See *The Benjamin A. Van Brunt*, 98 Fed. 131 (1 C.C.A.—1899).

came adrift in the current and consequently doomed for disaster.

The decisions of the Court of Appeals for the Second Circuit and the other authorities relied upon by the Court of Appeals herein (R. 969, Appendix C hereto (p. 50)), did not involve or in anywise contemplate the hazards of navigation against a continuous rapid and strong gravity current along the same constant path, such as exists in the Mississippi, with the consequence that, whether it be in fair weather or foul, every movement and maneuver of vessels navigating thereon, must of necessity be planned and executed in relation to the force and direction of the current.

The effect of this decision, if allowed to stand, will be to create navigational requirements on the part of a substantial segment of the American transportation industry—all commerce dependent on river navigation—which are impossible to meet. We say this because, with respect to other traffic on the river, the navigator must then plan each and every maneuver as though no current at all existed, yet at the same time, if he is to reach his destination, he **must** comply with the immutable laws of nature and make due allowance for the currents or else be swept to sea or inevitably be involved in a catastrophe with one or more of the other ever-present natural or man-made hazards of river navigation—the bends and turns, the bars and shoals, the jetties and wharves, the piers and bridges.

This decision involves an important question of Federal Law—a law affecting a large segment of American Commerce—a law over which the Federal Government has exclusive control—a law of which the controlling principles should be established by this Court for the guidance of all waterborne traffic faced with problems of

navigating with or against the powerful currents of rivers and channels.

2. The decision of the Court below that the ANTINOUS must be condemned because she ought to have been maneuvering in anticipation of the reckless navigation of the ARGENTINA, (R. 970, 971, Appendix C (p. 51)), is likewise without precedent and in conflict with the decisions of this Court. In *The Umbria*, 166 U.S. 404 (1897), this Court in a fog case, said at Page 417:

> "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. * * * "

And, again, at Page 418:

> "It should also be borne in mind that she had a right to assume that, even if the Umbria were not pursuing the moderate speed required by the statute, at least she was not guilty of maintaining the extraordinary and reckless speed of 19 knots per hour. * * * "

This doctrine laid down by this Court in *The Umbria*, *supra*, was affirmed by this Court in *The Chattahoochee*, 173 U.S. 540 (1899), at Page 548 as follows:

> " * * * It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. * * * "

The decision of the Court of Appeals below is likewise in conflict with decisions on the same matter of

Courts of Appeals of other circuits. It is in conflict with the decision in the First Circuit in the case of *Gertrude Parker Inc. v. Abrams, et al*, 178 F. 2d 259, 264 (1949), where that Court held:

> "The 'visible distance' test of moderate speed", under the Rule although useful in many situations, and frequently applicable, is not a universal one to be applied blindly. It is very generally applied in crowded waters, even though its application may require vessels, other than ferry boats to which special considerations apply, to remain moored or at anchor. But it would hardly be reasonable to apply it in such a way as to require a vessel to drift without steerageway in open waters, or to anchor in exposed or dangerous places. Furthermore, as far as we can ascertain, the test has only been applied when there was knowledge, actual or constructive, of the presence of other vessels in the vicinity. * * *"

It is in conflict with the decision in the Ninth Circuit in *The Diamond, The Indiana, Domaria v. Compagnie Generale Transatlantique*, 14 F. 2d 923, 925 (1926), which held on this point:

> "* * * Counsel for appellant have cited cases where the courts have followed the so-called rule of sight which is often applied where a vessel has known of the presence of another ship either by sight or sound, and has proceeded at such a speed as not to be able to stop and avoid collision with such known ship. In the present case, however, the Indiana did not know of the presence of the Diamond until the lights of the Diamond were seen just before the collision. * * *"

The leading American authority on Collision Law, Griffin, in *The American Law of Collision* (1949), Page 292, Section 117, referring to *The Umbria*, *supra*, and

The Chattahoochee, supra, as authority, lays down the rule as follows:

> "A vessel in thick weather must go at such speed only as will enable her * * * [2] to stop her headway within her share of her distance from an approaching vessel seen or heard ahead, always assuming that the other vessel is herself complying with the law as to speed and signals. * * * "
> (See also Section 118; page 298).

Yet in this case the Court of Appeals held the ANTINOUS equally at fault with the ARGENTINA, even though the ARGENTINA admittedly was proceeding at an excessive speed in the fog (ARGENTINA answers, Paragraph VII and Paragraph IV, R. 34, 40), and the District Court found the forward speed of the ARGENTINA at the moment of impact was at least 3 or 4 knots through the water and 6 or 7 knots over the ground (Finding XXVII, R. 941, Appendix B (p. 28)) while it found the ANTINOUS prior to the collision had stopped her headway through the water and had commenced going astern slowly (Finding XIV, R. 936, Appendix B (p. 24)), a holding clearly contrary to the law established by this Court, and by other Circuit Courts of Appeals, in the above quoted cases. In view of such Findings of the District Court, which were not set aside by the Court of Appeals, and the doctrine laid down in such quoted cases, in any event the Court of Appeals should have exonerated the ANTINOUS under the "Major-Minor Fault" Rule, which it has recently recognized as applicable to such type of cases, or under *The City of New York*[3] Rule, which was made by this Court for the patent purpose of modifying the earlier harsh rule of *The Penn-*

[3] *Star of Honduras—Queenston Heights*, 220 F. 2d 120 (C.A. 5—1955).

[4] 147 U.S. 72 (1893).

sylvania.[7] Practically all of the United States Circuit Courts of Appeals have found it necessary to resort to various legal fictions in order to avoid the catastrophic effect of *The Pennsylvania* Rule. Excellent discussions on this point, with full citations of the authorities, will be found in 45 Calif. Law Review, 304 at 340 (1957), *Contributions and Division of Damages in Admiralty and Maritime Cases*, by Grady S. Staring, and in *The American Law of Collision* by Griffin, *supra*, Sec. 224, p. 505, *et seq.*

3. The Circuit Court of Appeals has stated categorically that the ANTINOUS was required to proceed at such a speed as would enable her to stop within "one-half" of her visibility [R. 970, Appendix C (p. 51)].

The Court of Appeals for the First, Second, and Ninth Circuits are in conflict with the "rule of sight" as applied by the Fifth Circuit in this case.

The Court of Appeals for the First Circuit in the case of *Gertrude Parker Inc. v. Abrams, et al, supra*, applied the Rule as quoted above on Page 12 hereof.

In the case of *Polarus Steamship Company, Inc., The T S Sandefjord*, 236 F. 2d 270, 271-272 (1956), cert. den. 352 U.S. 982, the Second Circuit rationalized the Rule as follows:

> "True it is that there are statements that in congested harbor waters, and at times elsewhere, anything more than bare steerageway in the presence of fog may be too much. The Martello, 153 U.S. 64, 14 S. Ct. 723, 38 L. Ed. 637; The Umbria, 166 U.S. 404, 412, 17 S. Ct. 610, 41 L. Ed. 1053. Even more frequently, the applicable rule has been said to be that no vessel should be operated in a fog at a speed which is so fast that she cannot stop within the distance her helmsman can see ahead. The Chattahoochee, 173 U.S. 540, 548, 19 S. Ct. 491.

[7] 86 U.S. (19 Wall.) 125 (1874).

43 L. Ed. 807; The Colorado, 91 U.S. 692, 23 L. Ed. 379, quoting with approval, The Batavia, 40 Eng. L. & Eq. 25; The Haven, 2 Cir., 277 F. 957; The City of Norfolk, 4 Cir., 266 F. 641, certiorari denied sub nom. Chesapeake S.S. Co. of Baltimore City v. Hand, 253 U.S. 491, 40 S. Ct. 584, 64 L. Ed. 1028; The Northern Queen, D.C. S.D. N.Y., 117 F. 906; The Albatross, D.C. D. Mass., 273 F. 285; The Fjell, D.C. E.D. Va., 257 F. 478; see also, Marsden: Collisions at Sea 340 (9th ed., Gibb, 1934).

"(3) But these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule requiring operation at a moderate speed, and, like it, they must be applied according to the particular circumstances of each case. While there was some evidence that the range of visibility here was about a ship's length, some 400-odd feet, or, according to another witness, two ships' lengths, the trial judge very properly held that the distance could not be fixed with any accuracy. The purpose of the statute, spelled out in the 'sight rule,' is to require generally **and not absolutely** [1] that a vessel proceed only at such speed that it can stop before striking another vessel which comes into the range of its vision. And here the Polarusoil was 'stopped in the water and probably going astern very slowly at the time of the collision.' *Cf. The Pymaquid*, D.C. 255 F. 709, reversed on the facts, 1 Cir., 288 F. 666." (Emphasis ours)

In the case of *The Diamond, The Indiana, Demaria v. Compagnie Generale Transatlantique, supra*, the Ninth Circuit considered the Rule of visibility as inapplicable

[1] The Fifth Circuit construed the rule to be absolute when it said:

"The test of moderate speed is stated in terms of being able to stop within one-half of the distance separating the two vessels assuming the other is likewise proceeding at moderate speed. But this does not mean that the duty is not owed if, as might well be the case here, the approaching ARGENTINA's speed was likewise excessive." [R. 970, Appendix C (p. 51)].

to a similar situation which existed in that case of a vessel meeting an unseen, unheard and unknown vessel and said at page 925:

> " * * * Counsel for appellant have cited cases where the courts have followed the so-called rule of sight which is often applied where a vessel has known of the presence of another ship either by sight or sound, and has proceeded at such a speed as not to be able to stop and avoid collision with such known ship. In the present case, however, the Indiana did not know of the presence of the Diamond until the lights of the Diamond were seen just before the collision. * * * "

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed and the decree of the District Court should be reinstated.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FINAL DECREE

Minute Entry June 27, 1957 Christenberry, J:

(Number and title omitted)

This cause came on for trial at a former day before the Court, on the pleadings, evidence and testimony offered on behalf of the respective parties, and the matter was submitted, when the Court took time to consider.

Now, on due consideration thereof;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that there be judgment in favor of Pan Atlantic Steamship Corporation, respondent-claimant of the SS Antinous and against Libellants, O Y FINLAYSON-FORSSA A B; FINSKA SJOFORSAKRINGS AKTIEDOLAGET; ERIK STOKKEBYE; G. BIEHL & CO.; AKTIESELSKABET DE DANSKE BOMULDSSPINDERIER; AKTIESELSKABET GRON & WITZKE; FORSIKRINGS-AKTIESELSKABET SKANDINAVIA; MELBRANCHENS FAELLESINDKOB; DEN DANSKE MAELKEKONDENSERINKSFABRIK; ASSURANCE-COMPAGNIET BALTIC AKTIESELSKAB; R. FAERCH A/S; DEN KJOBENHAVNSKE SØASSURANCE-FORENING LMT.; A/S PRESSEFABRIK; FORSIKRINGSAKTIESSELSKABET NATIONAL; BOHLIN AND LOFGREN; FORSAKRINGSAKTIEBOLAGET ATLANTICA; ERNST COHN & CO.; L. J. WINGQVIST; FORSAKRINGSAKTIEBOLAGET MALAREN; THE CONTINENTAL INSURANCE

COMPANY; AMERICAN INSURANCE COMPANY OF NEWARK; and CHRISTIANIA SØFORSIKRINGSSELSKAB dismissing the libel with costs,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that there be judgment in favor of Det Forenede Dampskibs-Selskab, A S owner of the MV Argentina, claimant-impleaded and against Pan Atlantic Steamship Corporation, dismissing the petition of impleader at libellant's costs.

H.W.C.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

(Number and title omitted) (Filed: October 31, 1957)

Christenberry, J:

At about two o'clock A.M. on April 10, 1952, a collision occurred in the Mississippi River between Shingle Point and Scarsdale Light involving the Steamship ANTINOUS, which was owned and operated by Pan Atlantic Steamship Corporation, and the Motor Vessel ARGENTINA, owned and operated by Det Forenede Dampskibs-Selskab, A S.

O Y Finlayson-Forssa A B; Finska Sjoforskarings Aktiebolaget; Erik Stokkebye; G. Biehl & Co.; Aktieselskabet De Danske Bomuldesspinderier; Aktieselskabet Gron & Witzke; Forsikrings-Aktieselskabet Skanvinavia;

Melbranchens Faellesindkob; Den Danske Maelkekondenseringsfabrik; Assurance-Compagniet Baltica Aktieselskab; R. Faerch A S; Den Kjobenhavnske-So-Assurance-Forening Lmt.; A S Dansk Pressefabrik; Forsikringsaktieseliskabet National; Boklin and Lofgren; Forsakringsaktiebolaget Atlantica; Ernst Cohn & Co.; L. J. Wingqvist; Forsakringsaktiebolaget Malaren; The Continental Insurance Company; American Insurance Company of Newark; and Christiania Soforsikringsselkab, were owners, consignees, notify parties, or insurers of various shipments of cargo damaged while being carried aboard the Motor Vessel ARGENTINA subject to the provisions of the Carriage of Goods By Sea Act of 1936, 46 U.S.C. 1300, *et seq.*, under the terms of which the carrying vessel may be relieved from liability to her own cargo for any loss of or damage thereto caused by faults or errors in the navigation of such vessel.

As a result of the collision, the said cargo interests did not attempt recovery against the carrying vessel but filed a libel directly against the ANTINOUS seeking recovery for loss of and damage to such cargo. Pan Atlantic Steamship Corporation claimed the ANTINOUS, answered the libel, and filed a petition of impleader against the ARGENTINA under Rule 56 of the Admiralty Rules promulgated by the Supreme Court of the United States, alleging that her faulty navigation was the sole and proximate cause of libellants loss. Det Forenede Dampskibs-Selskab A/S filed claim to the ARGENTINA and answered the libel and petition of impleader. The answer admitted that the ARGENTINA was solely at fault for the collision and exonerated the navigation of the ANTINOUS in all respects.

This cause came for trial on the pleadings and evidence, the greater portion thereof being testimony of

witnesses before the Court, and due deliberation having been had thereon, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

The Steamship ANTINOUS was owned by Pan Atlantic Steamship Corporation, a corporation organized and existing under and by virtue of the laws of the State of Alabama. The Steamship ANTINOUS was a C-2 type dry cargo vessel built in 1944, of 8065 gross tons, 449 feet in length overall, 63.1 feet in beam; with a 6000 horsepower steam engine turning a single righthand propeller of nineteen foot pitch. Her normal maneuvering speeds through the water under average conditions of wind and sea were: full ahead, 80 revolutions per minute, 14.2 knots; half ahead, 40 revolutions per minute, 7.1 knots; ordinary full astern, 46 revolutions per minute; emergency full astern, 86 revolutions per minute.

II.

On April 9th and April 10th, 1952, the ANTINOUS, en route from Miami, Florida to New Orleans, Louisiana, was ascending the Mississippi River while approximately one-third loaded and drawing 15 feet 4 inches forward and 19 feet 4 inches aft. She was fully and properly manned and equipped and seaworthy in all respects.

III.

There was no appreciable wind. The average current in the river was no less than four knots with the current in the bends being somewhat greater.

IV.

At approximately 1:42 A.M. on April 10, 1952, as the ANTINOUS was proceeding upriver at full maneu-

vering speed near the East, or left descending, bank of the river below Scarsdale Light, which is on the same bank, and hence was on the right, or starboard, side, of the ANTINOUS, fog was observed ahead up river. She was showing proper lights and was being navigated from the bridge by her Chief Officer, Earl Evans, who was a duly licensed Pilot for the Mississippi River. A qualified seaman was at the wheel, and Third Officer William Graham was on a watch on the bridge and was handling the telegraph. A competent lookout, had, earlier, been stationed on the forecastle head. Fog was seen ahead which appeared to be lighter near the East, or left descending, bank, whereupon, at 1:42 A.M., the engines were slowed to half ahead, forty propeller revolutions per minute, reducing speed through the water to no more than 7.1 knots and speed over the ground to about 3.1 knots. The ANTINOUS commenced sounding regular fog signals at least every minute. The Master, Samuel Wonson, was called from the chartroom and came to the bridge.

V.

Upon first entering the fog, the Pilot and the Master of the ANTINOUS conferred as to the advisability of anchoring. The vessel then being in one of the deeper and swifter parts of the river, the Master and Pilot reasoned that it would be unsafe to anchor there in fog where other vessels might be encountered, and concluded with justification that the only safe procedure under the circumstances was to continue upriver a short distance while remaining in sight of and near the East bank and to anchor under Shingle Point, where the chart showed there to be a sheltered, and otherwise reasonably safe anchorage. The ANTINOUS was not equipped with radar and Pilot Evans rightly felt that it would be imprudent to leave the East bank or to seek an anchorage

on the West bank, since by doing so the ANTINOUS would leave a known position and be exposed to the hazards of unknown traffic in midstream.

VI.

When in the vicinity of Scarsdale Light, the ANTINOUS exchanged a series of fog signals with an unidentified vessel which was eventually observed to pass well clear to the port side of the ANTINOUS, between her and the West bank of the river.

VII.

A short time later, Second Officer John H. Stone, Jr., who, though off duty, had heard the fog signals of his ship, reported to the bridge and was ordered to the forecastle head to stand by the anchors.

VIII.

At 1:58 A.M., ANTINOUS time, when the ANTINOUS was approximately one-half mile above Scarsdale Light, parallel to and within 150 or 200 feet of the East bank and still proceeding with her engines half ahead, making 3.1 knots or less over the ground, her navigators and lookout heard a two-blast signal off the port bow at an unascertainable distance from an unseen vessel which eventually proved to be the Motor Vessel ARGENTINA. Being without radar, and no one on board having heard any whistle signals forward prior to this two blast signal, the ANTINOUS had had no reason until then to suspect the ARGENTINA'S presence.

IX.

Pilot Evans, immediately upon hearing the two-blast signal, ordered the engines stopped and simultaneously sounded four short blasts on the ship's whistle. Third Officer Graham promptly relayed the engine order to the engine room by means of the engine order telegraph.

Second Assistant Engineer Joseph Simon, Jr., on duty in the engine room, received the order and immediately stopped the ANTINOUS' engines. The ANTINOUS' heading was parallel to the East Bank.

X.

About a minute later, the ANTINOUS' navigators heard what they interpreted to be a danger signal followed by a second two-blast signal from the unseen ARGENTINA. Thereupon, the ANTINOUS' Pilot ordered the engines reversed full and sounded another danger signal, followed by a three-blast signal. Her Master ordered Graham to give the telegraph a "jingle", which was done, and the Second Assistant Engineer engaged the throttle emergency full astern.

XI.

The mast lights of the ARGENTINA were seen for the first time at a distance variously estimated to be between one and three ships' lengths and bearing approximately one and one-half points off the ANTINOUS' port bow. The ARGENTINA'S range was open and showed her to be headed diagonally across the ANTINOUS' bow on a course that would have brought her bow into contact with the river bank but for the ensuing collision.

XII.

In the meantime, the Second Officer, en route to the forecastle head, heard the ANTINOUS' backing signal as he crossed the foredeck. He continued forward over obstructions on deck, expended approximately thirty seconds insuring that the brakeband and anchors were clear for letting go, ordered the lookout off the bow, and then looked up and observed the ARGENTINA between 150 and 225 feet distant.

XIII.

The Chief Engineer, Marcine Langley, heard the ANTINOUS' first danger signal while in his stateroom which was located on the forward port corner of the midship house. He looked out of his porthole, heard whistles from a ship which he could not see, put on his slippers, and descended two decks to the engine room. Upon arrival there, he observed that the tachometer indicated that the propeller was turning 83 revolutions astern. He was in the engine room long enough to relieve the Second Assistant Engineer, send him to the fire room, and then open the throttle "a couple of more turns" prior to feeling the impact of the collision and observing that it occurred shortly after 0200, according to the engine room clock.

XIV.

Prior to the collision, the ANTINOUS' engines reached 86 revolutions per minute astern. Her headway through the water had stopped and she had commenced going astern slowly as her stern swung to port and her propeller wash reached a point forward of the midships house and bridge.

XV.

The Motor Vessel ARGENTINA was owned by De Forenede Dampskib-Selskab, A/S, a corporation existing under and by virtue of the laws of Denmark. Constructed in 1943, she was of 4629 gross tons, 350 feet in length overall, 50-1/2 feet in beam, with a 3200 horsepower diesel engine turning a single righthand propeller with nine foot pitch. Her normal speeds through the water were: full ahead, 160 revolutions per minute, 13.5 knots; half ahead, 110-115 revolutions per minute, 9.5 knots; slow ahead, 45-50 revolutions per minute, 4.5 knots; ordinary full astern, 167-172 revolutions per minute; and

emergency full astern, 175 revolutions per minute. The vessel was radar equipped.

XVI.

At about 1:00 A.M. on April 10, 1952, the Motor Vessel ARGENTINA, drawing 24 feet 6 inches forward and 22 feet 5 inches aft, got underway from Chalmette, Louisiana, and began descending the Mississippi River. A Crescent River Port Pilot was aboard and directing her navigation. Thereafter, intermittent fog limited visibility.

XVII.

Her radar was in operation and, apparently, was in good working condition. However, it was observed only intermittently by the Pilot, who, with her officers, did not properly interpret, or correctly appraise the information which it provided.

XVIII.

Conditions of fog and visibility varied as the ARGENTINA proceeded and her speed also varied. Fog signals were sounded intermittently but there was no regular system or time pattern employed and there is no evidence that signals were sounded at least once every minute.

XIX.

Assisted by the minimum current of four knots, her speeds over the ground were no less than the following: at full ahead, 17.5 knots; half ahead, 13.5 knots; slow ahead, 8.5 knots.

XX.

At about 0152 ARGENTINA time, or twelve minutes before collision, there was seen on the radar a vessel, which later proved to be the ANTINOUS, near the East

bank of the river. According to the radar, the range was almost three miles and the bearing was practically dead ahead or slightly off the ARGENTINA'S starboard bow. The ARGENTINA was then proceeding at full speed ahead, having rounded English Turn Bend to her right of the center of the river, and was shaping to a course of 180 degrees but was still swinging gradually to the left from an earlier heading of 200 degrees toward 190 degrees.

XXI.

By 0154 the ARGENTINA was steady on a course of 180 degrees to bring her diagonally toward the East bank. She was [in] heavy fog and speed was reduced from full to half ahead or about 13.5 knots over the bottom. Neither bank was visible to the eye. On the ARGENTINA's radar it was seen that the ANTINOUS, whose bearing had originally been practically dead ahead, now bore two points off the starboard bow. Misinterpreting the radar information, the ARGENTINA's navigators incorrectly assumed the change in bearing to mean that the vessels would pass starboard to starboard when actually there had been no course alteration by the ANTINOUS and her change in radar bearing merely reflected the gradual swing of the ARGENTINA to 180 degrees. Possibly contributing to misinterpretation of the radar observation was the presence of two other vessels, the ANITA and the tug RODE ZEE, which were near the West bank.

XXII.

At 0157, because of increasingly impaired visibility, the ARGENTINA's speed was further reduced to slow ahead, or some 8.5 knots over the bottom. Thereafter, although a fog signal was heard ahead on the starboard bow, the ARGENTINA did not stop, but instead at

0159 1/2 her speed was increased to half ahead on the mistaken assumption that the position of the unseen ANTINOUS from whom the fog signals were heard, had been correctly ascertained by the radar observations. Shortly after the said fog signal was heard forward, the masthead lights of the ANTINOUS were sighted, bearing twenty to twenty five degrees on the starboard bow. The sidelights were obscured by fog.

XXIII.

No fog signals were sounded by the ARGENTINA subsequent to 0159 1/2, ARGENTINA time, and there is no evidence to establish when the ARGENTINA last sounded a fog signal.

XXIV.

Although no sidelights of the ANTINOUS could be seen, a two-blast passing signal was sounded by the ARGENTINA shortly after the sighting, proposing to the ANTINOUS that the two vessels pass starboard to starboard. This signal was not audible on the ANTINOUS, possibly because of her own fog signals, and no reply was received by the ARGENTINA. Notwithstanding failure to obtain an agreement, and erroneously assuming that she was visible to the ANTINOUS, the ARGENTINA's Pilot ordered "easy port" and the ARGENTINA began swinging to her left increasing the angle to the East bank and across the course of the ANTINOUS. No further rudder orders were given prior to the collision.

XXV.

Shortly before 0202, ARGENTINA time, a second two-blast signal was sounded. At this time the ARGENTINA had reached a position near the East bank of the river, still swinging left from 180 degrees. This was

the signal heard by the ANTINOUS at 0158, ANTINOUS time, and to which she immediately replied by sounding the danger signal and simultaneously stopped her engines.

XXVI.

After hearing the ANTINOUS' danger signal, the ARGENTINA went astern, sounded the danger signal, and followed with a backing signal. This was the second signal from the ARGENTINA heard by the ANTINOUS and, interpreted to be a danger signal followed by a two-blast signal, was answered by a danger signal and a three-blast signal as the ANTINOUS reversed her engines emergency full.

XXVII.

The heavily laden ARGENTINA could not, and did not, stop her forward progress prior to the collision which occurred at 0204 ARGENTINA time and shortly after 0200 ANTINOUS time. At the moment of impact, her forward speed was at least three or four knots through the water and six or seven knots over the ground and her heading was less than 180 degrees true, probably about 160 or 170 degrees true. She would have struck the bank had she not struck the ANTINOUS.

XXVIII.

Under the sweeping effect of the current and momentum the starboard side of the ARGENTINA, in the vicinity of #2 hatch, came into contact with the prow of the ANTINOUS, as that vessel backed away through the water, at an angle of approximately 60 to 70 degrees (measuring clockwise from the center line of the ARGENTINA to the projected heading of the ANTINOUS), damaging both vessels and the ARGENTINA's cargo.

XXIX.

The range of visibility just before collision is not precisely ascertainable but was no less than two ships' lengths.

XXX.

The collision occurred at a point about one-half mile above Scarsdale Light, less than one-half ship's length from the East bank of the river.

CONCLUSIONS OF LAW

I.

The subject matter of this litigation, a marine collision, is within the admiralty and maritime jurisdiction of the Court. 28 U.S.C., 1333.

II.

The collision occurred in an area controlled by the Inland Rules, 33 U.S.C. 151, *et seq.*

III.

The Motor Vessel ARGENTINA was solely at fault for this collision.

IV.

The collision and resulting losses were caused solely and proximately by a combination of the following faults of the Motor Vessel ARGENTINA and those in charge of her navigation:

A. She failed to make proper use of her radar equipment. *Polarus Steamship Co., Inc. v. The T S Sandefjord, et al*, 236 F. 2d 270, 1956 A.M.C. 1779 (CCA 2, 1956), *cert den.*, 352 U.S. 982, 1 L. Ed. (2d) 365 (1957); *The Hindoo-Australia Star*, 172 F. 2d 472, 1949 A.M.C. 423 (CA 2, 1949); and *Barry-Medford*, 65 F. Supp. 622, 1946 A.M.C. 795 (E.D. N.Y. 1946) Radar is not a sub-

stitute for moderate speed nor does it serve as an excuse for non-compliance with the Rules. Undue reliance upon radar by the ARGENTINA is illustrated by her continued high speed, misinterpretation of the information it made available, and the initiation of a proposed passing which would not have been attempted in clear visibility or by a vessel not operating with radar.

B. Her speed was grossly immoderate. Inland Rules, Article 16 (33 U.S.C. 192).

C. She failed to stop her engines and to proceed with caution upon hearing a fog signal forward of her beam from the Steamship ANTINOUS. Inland Rules, Article 18 (33 U.S.C. 192); *Lie v. San Francisco and Portland SS Co.*, 243 U.S. 291, 37 S. Ct. 270, 61 L. Ed. 726 (1917).

D. She failed to sound fog signals at intervals of not more than one minute. Inland Rules, Article 15 (33 U.S.C. 191).

E. She proposed a starboard to starboard passage in violation of Article 18 of the Inland Rules when only the masthead and range lights of the ANTINOUS were visible to her and the vessels were not in sight within the meaning of the Rule. (33 U.S.C. 203).

F. She proposed and persisted in an attempt to execute a starboard to starboard passage, despite the fact that no assent to such proposal was received from the ANTINOUS. Inland Rules, Article 18 (33 U.S.C. 203); *The City of Tokio*, 77 F. 2d 315 (CCA 2, 1935) and cases cited therein; and the *John D. Rockefeller*, 272 Fed. 67 (CCA 4, 1921). See also, *Bisso Towboat Co., et al v. United States, et al*, 6 F. 2d 132, (CCA 5, 1925).

V.

The Steamship ANTINOUS complied with her obligations under the applicable laws and as set forth in the Inland Rules, 33 U.S.C. 151, *et seq.*, and navigated in accordance therewith.

A. She was not obligated by law to anchor, either before or after entering the fog. In that area of the river she was traversing prior to and at the time of entering fog, and in that area she was navigating after entering fog, river and traffic conditions rendered anchorage unsafe. Even more hazardous would it have been for her to cross from her known position on the East bank to the West bank through the center of the river where heavy traffic was to be expected. There is no designated anchorage on the West bank and as the fog was more dense on the West bank of the river, the ANTINOUS would have exposed herself and other vessels to greater danger. There were actually two other vessels already in the West bank area, and in addition to the ARGENTINA, there was still another vessel, the STEEL CHEMIST, downbound in the river. It was a proper and correct exercise of her navigators' discretion and skill to decide to continue up the East bank to the sheltered anchorage under Shingle Point. She could proceed to that anchorage in full compliance with the requirements of the Inland Rules. *Lakewood-Mohegan*, 28 F. 2d 795, 1928 A.M.C. 1760 (CCA 2, 1928); *The La Bourgogne*, 76 Fed. 868 (S.D. N.Y. 1896), aff'd. 86 Fed. 475 (CCA 2, 1898); and *The Benjamin A. VanBrunt*, 98 Fed. 131 (CCA 1, 1899).

B. The Steamship ANTINOUS was operated at a moderate speed and under proper control. *The Umbria*, 166 U.S. 404, 41 L. Ed. 1053 (1897); *Polarus Steamship*

Co., Inc. v. The T S Sandefjord, et al, 1956 A.M.C. 1000 (S.D. N.Y. 1955), aff'd. 236 F. 2d 270, 1956 A.M.C. 1779 (CCA 2, 1956), cert. denied, 352 U.S. 982, 1 L. Ed. (2d) 365 (1957); *Gertrude Parker, Inc. v. Abrams*, 178 F. 2d 259, 1950 A.M.C. 29 (CCA 1, 1949); *Diamond Indiana*, 14 F. 2d 923, 1926 A.M.C. 1698 (CCA 9, 1926); *The La Bourgogne*, 76 Fed. 868 (S.D. N.Y., 1896), aff'd. 86 Fed. 475 (CCA 2, 1898); and *The Benjamin A. Van Brunt*, 98 Fed. 131 (CCA 1, 1899).

C. The Steamship ANTINOUS was sounding fog signals as required by the applicable laws, rules and regulations. Inland Rules, Article 15 (33 U.S.C. 191).

D. The Steamship ANTINOUS responded properly to all signals she heard or should have heard from the ARGENTINA.

E. The Steamship ANTINOUS' lookout was efficient. He heard and saw all that could be reasonably expected of him and reported all of his observations.

F. The Steamship ANTINOUS acted prudently in rejecting the improper two-blast proposal of the Motor Vessel ARGENTINA, while stopping her engines and sounding a danger signal. Inland Rules, Article 18 (33 U.S.C. 203).

VI.

The admitted faults of the Motor Vessel ARGENTINA are clear. Entirely apart from any admissions, the record proves faults so flagrant, gross, and inexcusable, on the part of the ARGENTINA, that the Court must conclude that they were the only cause of the collision. There is no basis for the charges of fault made against the Steamship ANTINOUS.

VII.

Libellants are not entitled to recovery from their own carrier, the ARGENTINA, because of the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.*, relieving the carrier from liability for damage to and loss of cargo occasioned by faults or errors in the navigations of the carrying vessel.

VIII.

Libellants are not entitled to recover any damages or sums from the Steamship ANTINOUS or from her owners, Pan Atlantic Steamship Corporation.

Accordingly, a final decree has been entered dismissing the original libel as against the Steamship ANTINOUS, and her owners, and also dismissing the petition of impleader by such owners against the Motor Vessel ARGENTINA.

s/ Herbert W. Christenberry
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17042

O Y FINLAYSON-FORSSA A B; FINSKA SJOFORSAKRINGS AKTIEBOLAGET, ET AL.,
Appellants,

versus

PAN ATLANTIC STEAMSHIP CORPORATION, claim-

ant of the SS ANTINOUS, and DET FORENEDE DAMPSKIBSELSKAB A S, claimant of the M V ARGENTINA,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 1, 1958.)

Before RIVES, CAMERON and BROWN, Circuit Judges.

BROWN, Circuit Judge: Cargo on the Danish MV ARGENTINA sued the American SS ANTINOUS, the non-carrying vessel, for cargo losses sustained in the collision between the two vessels in the Mississippi River at about 0200 hours on April 10, 1952. After an extended trial and full arguments, the Court, on findings adopting almost altogether those physically prepared by the prevailing party in accordance with the local admiralty rules, held the carrying vessel solely at fault, the non-carrying SS ANTINOUS not at fault, and accordingly dismissed Cargo's libel. Cargo, the only party both aggrieved and free to do something about it, alone appeals from this decree. The ANTINOUS is satisfied, and if the ARGENTINA is unhappy about the implications, not the precise holding which likewise frees her of indirect cargo liability, she has foreclosed her right to complain and make no effort to do so here.

Cargo, with the irrepressible optimism, *Higgins Inc. v. Hale*, 5 Cir., 251 F. 2d 91, 1958 AMC 646, of their proctors who remember another day, seeks complete review and revision of nearly all of the critical fact findings, generally indifferent to the requirement of the new

dispensation, *McAllister v. United States*, 348 U.S. 19, 99 L. Ed. 20, 1954 AMC 1999, that nowadays we can only reverse if the findings are clearly erroneous [1] under the concept of FRCP 52(a) judicially engrafted onto the admiralty procedure. We resist these importunities for in our disposition of the case we may accept the fact findings although we confess that were we unable to place our decision on the one principal point we would be hard put to accept several of them. Here and there, as we point out, the most favorable construction of the evidence considered most favorably to the decree nevertheless requires that we read the findings of estimates on speed, distance and time on the minimum, not the maximum, side.

Collision occurred at 0200 hours in a dense fog about one-half mile above Scarsdale Light and within 150 feet off of the East (right ascending) bank. The SS ANTINOUS, upbound for New Orleans, partially loaded, was a C—2 vessel, 449 feet in length with 6,000 h.p. steam turbines and whose normal maneuvering speed was 14.2 KTW [2] at full ahead and 7.1 KTW at half ahead. The current of the river was running downstream at not less than 4 knots. The MV ARGENTINA downbound from New Orleans substantially but not fully loaded and trimmed approximately two feet by the head, was a Danish cargo motor ship 350 feet in length with 3200 h.p. diesel motor and whose normal maneuvering speed was 13.5 KTW at full ahead, 9.5 KTW at half and 4.5 KTW at slow ahead. She was equipped with radar.

Scarsdale Light is about 2-1 2 miles below Shingle

[1] We have applied this many times: Green v. Crow, 5 Cir., 243 F. 2d 401, 1957 AMC 726; Ionion S S. Co. v. United Distillers, 5 Cir., 236 F. 2d 78, 1956 AMC 1750; Societa Anonima Navigazione Alta I. v. Oil Transport Co., 5 Cir., 232 F. 2d 422, 1956 AMC 1073; C. J. Dick Towing Co. v. The Leo, 5 Cir., 202 F. 2d 850, 1953 AMC 498.

[2] KTW = knots through the water. As later used, KOG means knots over the ground.

Point at English Turn Bend. Coming downstream this is a sharp left bend. As a downbound vessel straightens up below English Turn Bend, she is on a course near 180 degrees. At a point about 3.4 mile above Scarsdale Light the River bends slightly to the right (west) so that its axis is about 215° for a distance of over 2 miles which includes the area in which the significant maneuvers of the SS ANTINOUS commenced. While the angle of convergence was slight, it may well have been the thing which set the stage for collision. As the MV ARGENTINA was steering a compass course approximately 180° T and the SS ANTINOUS was threading the stream parallel to the east bank, this could produce on the ARGENTINA's radar screen the picture, if not carefully read, of a vessel approaching well off the ARGENTINA's starboard bow. That is how the ARGENTINA treated it, though mistakenly, for had collision not occurred, she would have shortly run aground on the east bank.

At Collision Time[1] minus 18 minutes (C-18) the SS ANTINOUS, when in the vicinity of the Seatrain loading docks and after running for some time at full ahead, reduced her engine speed to half ahead on account of fog closing in. She was then near the East (right ascending) bank and the Pilot,[2] after consulting with the Master who had been called to the bridge because of the fog, decided that the vessel should anchor but that it would be imprudent to do so until the vessel reached an anchorage just below Shingle Point approximately two miles above Scarsdale Light. She continued on at this speed and course blowing customary fog signals.

The first she knew of the downbound ARGENTINA was at C—2 when a 2-blast signal, interpreted as a proposal for a starboard to starboard passage, was heard off

[1] See next page.
[2] The Chief Officer was serving as Pilot under his Federal License.

[3] By synchronizing ANTINOUS and ARGENTINA time from the various bell and log books of the vessels, collision developed this way:

ANTINOUS			Synchronized Collision Time	ARGENTINA	
Bridge Time		Bell Book Time	C—18	Bell Book and Time	
0112	Vis. becoming limited Fog Signals started	0131 Slow Ahead			
	Slow Ahead				
			C—16 ½	0147-½	Full Ahead
			C—12	0152	SS ANTINOUS first seen on radar
	ANTINOUS passed descending vessel abeam Scarsdale Light		C—10	0154	Half Ahead
					SS ANTINOUS 2 pts. off Stb bow on radar
			C—7	0157	Visibility reduced Heard fog signal from ANTINOUS
			C—4 ½	0159-½	Sighted ANTINOUS on radar 2 blast blown Half Ahead

[3] (Continued)

	Heard 2-blast signal off port bow. Replied with danger signal Stop	0158	Stop	C—2	0202	Blew second 2-blast	
						Full Astern	
				C—1½	0202-½	Full Astern emergency	
	Danger signal heard from ARGENTINA and second 2-blast. Replied danger signal and 3-blast reversing signal	0159	Full Astern	C—1	0203		
	Full Astern						
	First saw ARGENTINA						
*0200	Stop Full Astern Hit Tanker Full Astern	0200	At 0200 felt ships jar slightly	C	0204	Stop	
						Hit by ANTINOUS	
*0201	Slow Ahead	0201	Stop Slow Ahead Stop	C—1		Stop	
*0201.5	Stop			C—1½	0204-½	Half Ahead	
						Stop	

*Entries as appear in Bridge Bell Book

the port bow, although the ARGENTINA could not then be seen. All the ANTINOUS' witnesses swore, although her logs do not bear them out, that she then immediately replied with a 4-blast alarm whistle and stopped her engines. Shortly thereafter and at C—1 she heard whistle alarms from the ARGENTINA again followed by a 2-blast signal. At this moment the ARGENTINA came into view for the first time about two ship lengths away. To this the ANTINOUS responded with the alarm; put her engines on full astern (emergency) and blew the 3-blast reversing signal. Within the minute collision occurred. The angle of collision was about 70° with respect to the center-line of the ANTINOUS. The stem and bow of the ANTINOUS penetrated 9 feet into the starboard side of the ARGENTINA from below the waterline to weather deck at a point about 70 feet abaft her stem. Not surprisingly, the ANTINOUS claims she was making sternway, so that the collision force came entirely from the forward momentum of the ARGENTINA.

Meanwhile, back on the ARGENTINA, things were occurring. At C—16 1 2 her engines were put on full ahead. At C—12 she saw on her radar for the first time an approaching vessel (this turned out to be the ANTINOUS) bearing dead ahead or slightly off her starboard bow. At that time the ARGENTINA was shaping up from 200-190° to her expected course of 180°. At C—10 fog became heavy and she reduced engine speed to half ahead. However, the bearing of the approaching ANTINOUS had now changed to 2 points off the ARGENTINA's starboard bow. This radar picture was misinterpreted and led the ARGENTINA to assume that a starboard to starboard passage could be made. As fog became more dense, speed was reduced to slow ahead at C—7. At C—4 1 2 when the ARGENTINA heard, but ignored, a fog signal from the ANTINOUS, her speed

was increased to half ahead and shortly thereafter the masthead lights (but not the side lights) of the ANTINOUS were observed bearing 20 to 25 off the starboard bow. About this time the ARGENTINA blew a 2-blast passing signal, not heard on the ANTINOUS, and her course was probably altered a little more to the east by an easy left rudder order. Shortly before C—2 the ARGENTINA again blew a 2-blast signal and on hearing the danger alarm from the ANTINOUS at C—1 1/2 the engines of the ARGENTINA were put on full astern and held there until the collision moment.

On this the Court roundly condemned the ARGENTINA on several scores, all of which we accept as none are here challenged or open to review. At the same time the ANTINOUS was exonerated of the several charges of fault still asserted by Cargo.

Oddly enough in making subsidiary fact findings and these fact-legal conclusions, the Court *added* to the ARGENTINA's speed through the water the 4 knot current but *deducted* it from that of the ANTINOUS. This made the ARGENTINA's speed 17.5, 13.5, and 8.5 KTW at full, half and slow ahead in contrast to the ANTINOUS' corrected speed of 10.2 at full ahead and 3.1 at half

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[1] Accepting the ANTINOUS story of two separate series of 2-blast signals heard on the ANTINOUS at C—2 and C—1, this means that three such signals were blown by the ARGENTINA. The evidence to support this is doubtful and this lends credence to Cargo's charge that the ANTINOUS logs, not her swarers, came closer to the truth.

[2] The Court found the ARGENTINA at fault for failure to make proper use of her radar equipment, immoderate speed under Article 16 of the Inland Rules, failure to stop her engines on hearing forward of the beam the fog signals from the ANTINOUS at C—4 1/2, failure to sound fog signals and for proposing and persisting in a starboard to starboard passage in fog and without assent from the ANTINOUS.

[3] The Court found the ANTINOUS (A) was not at fault for failing to anchor either near the East bank or by crossing the river diagonally to the anchorage near the West bank; that she (B) was operated at a moderate speed under proper control; (C) had sounded proper fog signals; (D) had responded properly to the ARGENTINA's signals; (E) maintained a proper lookout and had (F) acted prudently in rejecting the 2-blast passing proposal.

ahead. It was this latter speed of 3.1 KOG which the Court found moderate.

There are several things quite unique about this case and the successful development of it by the ANTINOUS. This includes the rare fact that the ANTINOUS, the prevailing party, succeeded in the face of solemn log entries which either condemn[9] her if accepted or cast considerable doubt on the integrity of her story if ejected on the basis of the explanation offered. Indeed, the *rejection* of the log entries has implications even more disturbing than acceptance of their truth, as damaging as that would be. For the story was that the Mate on watch, unable to record bridge bell orders because he dropped his flashlight, made up the bell book record[10] an hour later from his estimate[10] of the time of the orders

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[9] A crucial question was the speed of the ANTINOUS and whether, on hearing the first 2-blast signal from the then unseen ARGENTINA, she complied with the duty to stop and thereafter proceed with caution. The deck log plainly states that the engines were not stopped at C—2 and it was not until C (0200 hours) that the stop-full astern engine maneuvers were undertaken, almost simultaneously. The deck log of the ANTINOUS contains the following entries:

"0158 A vessel sounded passing signal 'two blasts' and was answered immediately with danger signal. Approaching vessel answered danger signal and repeated 'two blasts.' This vessel sounded danger signal again.

"0200 Vessel stopped and rung full astern and given extra jingle. Vessel proceeded to come without altering course and fell against this vessel's bow. " " "

[10] The actual bridge bell book entries were:

0142 [C—18] Slow Ahead * vis: becoming limited fog signals started

0200 [C] Stop* — Full Astern* — but tanker & Full Astern *

* Shown by usual symbols

[10] This is perhaps the most remarkable thing about this whole phase. The Third Mate, at the bridge telegraph, after the entry of 0142, note 9, supra, made no entries until an hour after collision. Except for the Collision Time (0200) which he fixed precisely as he had glanced at the clock at the moment of impact, all times were estimated and then written in the bell book without consulting anyone or first checking against the engine bell-book. As recollected and estimated, they jibe almost to the second.

(Continued)

and, based upon these inaccuracies made up, still another hour later, the deck log, note 8, *supra*. He swore that he knew the deck log entry, note 8, *supra*, was wrong, and the Pilot-Chief Officer and Master, each of whom had subscribed to the log some hours thereafter, likewise acknowledged that at the time the log was tendered to the United States Coast Guard Investigating Officers later that very day, it was known to be wrong. Accepting the Master's explanation as to the source of the errors (dropping the flashlight) such subsequent action hardly square with our notions of the importance of the vessel's logs or the necessity that they speak, or at least are thought to speak, the truth as the lines are written and subscribed. The Georgian, 5 Cir., 76 F. 2d 550, 551, 1935 AMC 556, 558.

Next, on matters of extreme importance, there was a marked discrepancy, always in favor of the ANTINOUS, between what was sworn to under oath in the extensive Coast Guard investigations held shortly after the occurrence, and that sworn to three years later in Court. Velma Lykes—Tug Anita D., 5 Cir. F. 2d , 1958

[10] (Continued)

Bridge Bell Book		Engine Bell Book	
0201	Slow Ahead	0201+	Slow Ahead
0201.5	Stop	0201+	Stop
0207	Slow Ahead	0207	Slow Ahead
0208	Half Ahead	0208—½	Half Ahead
		0208—½	Full Ahead
0209.5	Full Ahead	0209—½	Stop
			Full Ahead
		0209—½	Full Ahead
0210	Stop	0210	Stop
		0210—½	Full Astern
0211.5	Full Astern & Stop	0211	Stop
		0211	Half Astern
		0211—½	Full Astern
0212	Full Astern		
0213	Stop & let go	0213	Stop
0219	Slow Ahead	0219	Slow Ahead
0220	Stop	0220	Stop

AMC 722. The lookout testified [11] before the Coast Guard that in the moments before the 2-blast signal from the ARGENTINA was heard, he heard short blasts one and one-half points on the port bow which he assumed were fog signals. Shortly the ARGENTINA came into view bearing one and one-half points on the port bow. If that were so, it was a patent fault for ANTINOUS not to have stopped her engines. On the trial his testimony was that in the Coast Guard hearing testimony, he was referring to a vessel which had passed them while abeam Scarsdale Light. Since that point was fixed on land and collision occurred at least a half mile above this Light, this meant that at the ANTINOUS' speed of 3.1 KOG this passage occurred ten minutes before collision.

Of course, with the admitted speed of the ANTINOUS, the exigencies of litigation required all the distance that could honestly be obtained on the issue of the range of visibility. The Pilot, on the trial, swore that this was two ship lengths or more, and the Court so found. At the Coast Guard hearing, he testified that he estimated the visibility to have been "500 feet, maybe." We need not determine whether on his acknowledgment that he had testified to whatever the Coast Guard record showed he had, this made this excerpt something more than prior inconsistent statements and admissible assertively, McCormick on Evidence, § 39, pp. 73-82; Wigmore on Evidence, 3rd ed., §§ 1017, 1018, see note 11, *supra*, for the ANTINOUS subsequently offered in evidence other excerpts which became proof of the facts stated that visi-

[11] It was stipulated that the Coast Guard record testimony of the lookout and four or five others could be introduced as original evidence. This was not then the case of mere proof of prior inconsistent statements admissible for impeachment but not in proof of the facts stated. Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co., 5 Cir., 247 F. 2d 116, 1957 AMC 1946, cert. den., 355 U.S. 903, 2 L. ed. 2d 260.

bility was at most a ship length.[12]

There were many other specific instances on such crucial items as the time[13] elapsing between the giving, receipt and execution of the stop order at C—2, the full astern at C—1, and between either or both and actual collision impact, the reason for not stopping the engines, distance and bearing of the ARGENTINA as she came into view and the like.

Another thing is that in the ANTINOUS' advocacy unavoidably carried forward in many of the findings prepared by her Proctors and adopted[14] by the Court, there is a remarkable rejection of unfavorable positions and testimony of witnesses otherwise championed and a tendency to switch positions[15] as exigencies seem to require.

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[12] "* * * When he [the ARGENTINA] answered my danger signal the first time and gave me two blasts and I gave him the danger signal again, he came into view, possibly—I would say *at the most a ship length away from us.*" (Emphasis supplied).

[13] Much of this was in the stipulated portions of the Coast Guard record, note 11, supra.

[14] We do not discredit them or treat them as any less the Court's findings. Mississippi Valley Barge Line Co. v. Cooper Terminal Co., 7 Cir., 247 F. 2d 321, 1955 AMC 266; O'Leary v. Liggett Drug Co., 6 Cir., 150 F. 2d 656; Simons v. Davidson Brick Co., 9 Cir., 106 F. 2d 518, 521; Schilling v. Schwitzer-Cummins Co., D.C. Cir., 142 F. 2d 82; cf. The Severance, 4 Cir., 152 F. 2d 916, 1946 AMC 128, cert. den., 328 U.S. 853, 90 L. ed. 1626; Red Star Towing & Transportation Co. v. The Hudson, 2 Cir., 219 F. 2d 307, 1955 AMC 510. If they go too far, they are weakened intrinsically because they go too far, not because Proctors under local Admiralty Rule 12 have first drafted them.

[15] For example, on the issue of the speed and movement of the ANTINOUS as the ARGENTINA came into view, ANTINOUS vigorously asserts that Capt. Brummelen, Master of the SS STEEL CHEMIST following downstream one-half mile or so astern of the ARGENTINA and who had such a ringside seat by radar that he called to his pilot to come over and watch a collision take place, was not in a position to state, as he emphatically did, that the ANTINOUS rather than having sternway was actually moving ahead through the water and had, during these two minutes (fixed by the two-blast signal and the alarms) moved a quarter of a mile from one position to another fixed with precision by him on two charts using simulated range rings. At the same time the ANTINOUS, desirous of reducing as much as possible the distance made good over the ground from C—18 to C, asserts that Brummelen's fixing the point of collision at one-half mile rather than three-quarters of a mile above Scarsdale Light as fixed by her own pleaded sworn answer, and testimony of her watch officer, Pilot, the Pilot of the STEEL CHEMIST and the ARGENTINA, was the

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And perhaps strangest of all was the judicial admission by the ARGENTINA that she was solely at fault and the ANTINOUS free from fault. For this admission was spurious, not in the moral sense, but in the legal sense. No disparagement of motive or conduct by parties or counsel is made or intended. On the contrary, settlements are to be encouraged and this one certainly reflects the consummate skill of the ARGENTINA's proctors who, as articulate craftsmen, had much reason to be pessimistic about the case as a whole which included not only Cargo's substantial claim, but extensive claims by both vessels for collision damage. But in that setting, this was not a judicial admission freely made. It was a tails-you-lose-heads-I-win settlement[16] made prior to the filing of the ANTINOUS 56th Rule petition for Im-

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[15] (Continued)

only reliable guide. Likewise, to Cargo's contention that the ANTINOUS should have anchored near the East bank as fog closed in, the reply was that there was too much downbound traffic in this area for this safely to be done. Later, in asserting that unique circumstances, cf. Polarus Steamship Co. v. The T/S Sandefjord, S.D. N.Y., 1956 AMC 1000, aff'd 2 Cir., 236 F. 2d 270, 1956 AMC 1779, made the rule of sight for moderate speed inapplicable, the ANTINOUS contended that she had no reason to anticipate downbound vessels within 200 feet off the East bank. To the latter may be added the strange contradiction made in refutation to Cargo's experts who testified that descending vessels taking the bend usually followed the course of the ARGENTINA with ascending vessels proceeding diagonally toward the West bank. Cross examination of these experts by the ANTINOUS and her own controverting 'experts' testimony was that vessels did not follow any pattern—one could expect them to be in any portion of the River and especially so in fog.

[16] The written settlement agreement executed by ANTINOUS and ARGENTINA stated that " * * * in consideration of the ARGENTINA not now filing a libel * * * for the Argentina's damages * * * and of the Argentina admitting that its navigational fault * * * was the sole cause of this collision * * * " the two vessels agreed that "(2) If the final outcome * * * " on trial or appeal is that both vessels were at fault "the ANTINOUS agrees" (notwithstanding the ARGENTINA'S judicial admission of sole navigational fault) that * * * " the ARGENTINA, by libel or arbitration shall recover her legally provable damages on the basis of mutual fault; and that "(3) * * * If the final outcome" by trial or appeal finds the ARGENTINA to be partially or wholly at fault, then the ANTINOUS shall recover accordingly all or part of her provable damages by libel or arbitration. It bound both not to make a separate settlement with Cargo, but permitted either to inform Court and counsel of the agreement. The latter was done and the settlement agreement was received as an exhibit.

pleader and ARGENTINA's sworn answer to that petition and to the original Cargo libel.[17] By making the settlement, the ARGENTINA gave up nothing. She knew she could never escape a finding of partial fault. She knew she could never fasten sole fault on the ANTINOUS. The most she could hope for, was a mutual fault decree. She knew that if she did so, she would find herself paying one-half of her own cargo's losses under the now familiar principles[18] even though she had no direct liability to Cargo under the Carriage of Goods by Seas Act, 33 USCA 1300-1315. To admit sole fault and withdraw her strength from the side of her Cargo with whom, as an ally, she had been making common and vigorous cause up to date, might eliminate that risk altogether, especially so since, as the agreement permits, if this tactical maneuver were to fail in its objective, the ARGENTINA could still have all she would have ever gotten.[19]

[17] Cargo's libel was filed April 3, 1953. On August 31, 1953, the ANTINOUS, before filing answer to the Cargo libel, filed a 56th Rule Impleader against the ARGENTINA and subsequently an answer to the original Cargo libel was filed. The ARGENTINA on September 21, 1953, filed separate answers to the ANTINOUS' Petition of Impleader and Cargo's original libel admitting it sole fault. The settlement agreement binding it to do so was consummated ten days earlier on August 20, 1953.

[18] The Irrawaddy, 171 U.S. 187, 43 L. ed. 130; The Chattahoochee, 173 U.S. 540, 43 L. ed. 801; Toluma-Su'arseco, 294 U.S. 394, 79 L. ed. 942, 1935 AMC 412; Esso Belgium-Nathaniel Bacon, 343 U.S. 236, 96 L. ed. 907, 1952 AMC 659; Grecian-City of Chattanooga, 2 Cir., 78 F. 2d 657, 1935 AMC 1039.

[19] The settlement also eliminated the unpredictable likelihood of the Court holding the ANTINOUS liable to Cargo though as between herself and ARGENTINA the major-minor fault rule would exonerate the ANTINOUS. The Modemi, 5 Cir., 58 F. 2d 916, 1932 AMC 1600; Cape Cod-Michael Tracy, 2 Cir., 43 F. 2d 965, 1930 AMC 1855; Stadacona, 6 Cir., 242 Fed. 624, Griffin on Collision, 509-511, and on that basis grant indemnity or contribution to the ANTINOUS. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 96 L. ed. 318, 1952 AMC 1. This possibility was posed by Griffin, id. at 510:

> "If a case arises in which B, [ANTINOUS] the minor fault vessel, is held liable to A's [ARGENTINA'S] cargo, but where, as between the vessels, A [ARGENTINA] is held solely liable, one may wonder whether in the resulting offsets between A and B, the rule of the *Chattahoochee*, 173 U.S. 540, will permit B [ANTINOUS] to throw the entire cargo damage

(Continued)

It was an admission of fault only so long as it worked.

As disturbing as some of these implications may be, we find it unnecessary to determine whether they would make related findings clearly erroneous. This is so because in the setting of which these and other circumstances were a part, the speed of the ANTINOUS was plainly immoderate.

Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. The Tug Percheron, 5 Cir., 246 F. 2d 135, 1957 AMC 1941; The Nacoochee, 137 U.S. 330, 339, 34 L. ed. 687, 690; The Umbria, 166 U.S. 404, 417, 41 L. ed. 1053, 1060; Griffin on Collision, p. 288-296. In this area the Mississippi River was a busy artery in which many vessels upbound, downbound and at anchor might be expected. The hazard of proceeding on was demonstrated by the contemporaneous decision of two other ascending vessels to come to anchor near the West bank and the determination by the ANTINOUS Pilot and Master to do the same.[*] That traffic made it unwise either to anchor

(Continued)

on A [ARGENTINA], in spite of the latter immunity from direct suit under the Harter Act and the Carriage of Goods by Sea Act."

We have seen substantially such results occur in the now prevalent third party longshoreman death and injury cases: Ryan Stevedoring Co. v. Pan-Atlantic SS Corp., 349 U.S. 901, 100 L. ed. 133, 1955 AMC 1425; Weyerhauser SS Co. v. Nacirema Co., U.S. , 2 L. ed. 2d 941, ref. American Stevedores, Inc. v. Porello, 330 U.S. 446, 91 L. ed. 1011, 1947 AMC 349; Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra; Czarnicki v. SS Hoeghe Silvercloud, 351 U.S. 525, 100 L. ed. 1387, 1956 AMC 1465.

[*] The Pilot testified:

"Q. Captain, you evidentally considered that it was not safe to proceed under the conditions you encountered or you would not have considered anchoring. Isn't that correct?

"A. That's correct. Yes, sir."

The Court found that the Master and Pilot correctly "reasoned that it would be unsafe to anchor there in fog where other vessels

(Continued)

immediately near the East bank or cut across to the West only served to increase, not decrease, the demand for vigilant caution.

As she continued on, conditions got worse, not better. Notwithstanding this, she persisted in holding her speed at half ahead until within two minutes of the fatal impact. We need not minutely examine the evidence on speed. The Court fixed this at 7.1 KTW.[2] As thus fixed it was, in our view, an immoderate speed. We agree however, generally with Cargo that this was the irreducible minimum and there is much to indicate that speed was actually greater. This is demonstrated by the distance made good over the ground between the two known times of C—18 and C. Of course the shorter the distance the lower the speed. By liberal adjustments in favor of the ANTINOUS fixing the starting point one thousand feet below the Seatrain Loader and the point of collision one-half mile above Scarsdale Light as fixed by Capt. Brummelen, the distance made good was 1-1/4 miles for a minimum speed over the ground of not less than 7.1 knots. Using estimates of a beginning point farther below and extending the point of collision to 3/4 of a mile above Scarsdale Light as the ANTINOUS' witnesses almost universally swore, the speed made good over the ground ranged from 4.8 to 7.5 KOG with the speed through the water ranging from 8.8 to 9.8 KTW. It bears repeating here, see note 15, *supra*, that Capt. Brummelen or the SS STEEL CHEMIST, from his vantage point watching a collision develop and occur, fixed

[2] (Continued)
might be encountered * * *", and in the Conclusions of Law [illegible] the ANTINOUS was not obligated to then anchor since " * * * [illegible] that area of the River she was * * * navigating after entering the river and traffic conditions rendered anchorage unsafe."

[3] The 7.1 KTW figure was based entirely on the pitch-rpm-revolution formula. To find the speed of 3.1 KOG the Court simply deducted the 4 knot current.

the movement of the ANTINOUS with some precision at close to a quarter of a mile, a speed much in excess of 3.1 KTW.

Whether the speed was 7.1 KTW or greater does not really matter. At the lesser figure there was no showing that this would permit the ANTINOUS to stop within half the distance of visibility and the evidence on what she could do at an even lower speed (3.1 KTW) carried as its own reflex proof positive that it could not be done at 7.1 KTW. The evidence most favorable to the ANTINOUS on her reversing capabilities came from a Company Pilot who had conned her many times. Under questioning which carefully prescribed a simulated speed through calm water of 3.1 KTW, he stated that from the moment the full astern order was given until the vessel was stopped, it would take in point of time, 15 seconds to a minute and in distance approximately one ship's length.

But she was not proceeding at 3.1 KTW at the time either the stop order was given at C—2 or full astern at C—1. She was proceeding through the water at a speed over twice that great when the stop order was executed and there is no showing at all that within the seconds remaining in the minute of C—2 her momentum fell off anywhere near to a speed of 3.1 KTW. And the most favorable evidence from her engineer Watch Officer was that with the engines stopped, it would take 30 seconds before the *engines* would be turning full astern.

The speed through the water as C—1 commenced was greater than 3 KTW and the minute was half over before the full astern order was effective. The bridge Watch

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[2] See note 3, supra. The stop at C—2 was executed at 0158 *plus* and the full astern C—1 at 0159 *plus*, engine room time. The recorder testified that a plus meant any time after the sweep second hand had passed the preceding minute until it passed the next minute

Officer fixed impact time at precisely 0200 and so did the Chief Engineer in the engine room. The Engineer Watch Officer fixed the time between the receipt of the full astern order and the impact at 50 seconds. This means that on her own story put forward most favorably to her, the ANTINOUS had effective emergency full astern on her propeller for 20 seconds.

Of course the major error in the argument advanced by the ANTINOUS and adopted by the Court was that the revelant speed was *over the ground* so that the assumed current of 4 knots should be deducted. We think it would be unwise here precisely to chart the circumstances and the extent to which tide or current is or is not to be taken into account in computing moderate speed in fog situations. We have no difficulty though in saying that for these circumstances it was not to be deducted. The ANTINOUS was not then navigating relative to an anchored vessel or a fixed object. She was, or ought to have been, maneuvering with respect to another vessel not only moving, but moving at a speed she and the Court characteried as grossly excessive. That being so, to satisfy the test in terms of ability to stop, the ANTINOUS had to demonstrate that in the common body of water affecting both vessels substantially alike, she could stop before she traversed one-half the distance she could see. *A. H. Bull SS Co. v. United States*, 2 Cir., 34 F. 2d 614, 1929 AMC 1175; The Lillian Anne-Pennsylvania, 2 Cir., 1934 AMC 569, cert. den., 293 U.S. 575, 79 L. ed. 673, 1934 AMC 1410; The Goldshell-White Plains, 2 Cir., 224 F. 2d 86, 1955 AMC 1438; Marsden's Collisions at Sea, 10th Ed. 1953, p. 479-480. It has been well put: "That is to say, it is the duty of a vessel to proceed in a fog at a moderate speed, both with respect to moving and to anchored vessels. That she is proceeding at a moder-

ate rate of speed over the ground will not free her from blame, if, proceeding immoderately through the water, she strikes a vessel under way. That she is proceeding moderately through the water will not excuse her, if, proceeding immoderately over the ground she strikes a vessel properly anchored. * * * " The Yarmouth, D.C. Mass., 100 Fed. 667, 671. We do not regard The Silvanus, D.C. La., 56 F. 2d 257, 1932 AMC 154, aff'd 5 Cir., 66 F. 2d 113, 1933 AMC 1211, to the contrary.

On her own most favorable testimony, we do not quite see how the Court could find that the ANTINOUS was stopped and making sternway. But accepting this, there was still no proof that this remarkable feat, achieved in a minute's time and in a way which exceeded her capabilities at a speed half as fast, was accomplished within one-half of the distance between them. To stop or to be able to stop before collision is not enough. That must be done within the vessel's share[24] of visibility.

Once we reach this conclusion that the District Court on the basis of its own fact findings was wrong in its legal conclusion that the speed of the ANTINOUS was moderate, there is no room for application of the rule of the City of New York, 147 U.S. 72, 37 L. ed. 84.[a] The evidence of the ANTINOUS' fault on this score is clear, indeed, uncontradicted. We may, as did the District Court, call the ARGENTINA's faults glaring. But the statute imposed a positive duty on the ANTINOUS to proceed at a moderate speed. The test of moderate speed is stated in terms of being able to stop within one-half of the distance separating the two vessels assuming the other is likewise proceeding at moderate speed. But this does not mean that the duty is not owed if, as might well

[24] The Court found that at the moment of impact the ARGENTINA'S speed was 3 to 4 KTW.

be the case here, the approaching ARGENTINA's speed was likewise excessive. Fog rules take into account the uncertainties as this enigma of nature shuts out sound and sight and frequently understanding. The risk of collision in fog is best avoided by complying with all three requirements, blowing and listening for fog signals, proceeding at a moderate speed, and stopping after whistles from unseen vessels are heard forward of the beam. While the law normally concedes that one may act upon the assumption that others are obeying, not violating, the law, the operation of statutory navigation requirements and the heavy sanction which Courts place on violations of them, The Pennsylvania, 86 U.S. (19 Wall.) 125, 22 L. ed. 148, reflect a purpose neither to make an outlaw of one violating the rules, nor excuse the other from the performance of correlative duties. That this is a wise rule is shown here by the slight additional margin which would have prevented this collision.

For 18 minutes the ANTINOUS was proceeding in fog at 7.1 KTW. She was entitled to do that only if she could see twice the distance which that speed required for her to stop in the water. But she could see only that distance which required that her speed be 3.1 KTW if she were to stop within her half. Consequently, she had failed in her duty for nearly 18 minutes. Her speed was not moderate when she first heard the ARGENTINA's two-blast signals. It was not moderate as she speculated for a minute's time and stopped her engines. It was not moderate as the ARGENTINA hove into view.

When a plain statutory command is violated on the uncontradicted story of the vessel's own witnesses stated most favorably to her cause, she cannot escape the consequences because fault of the other may be more glaring, more flagrant, or more shocking. Her last clear chance

to extricate herself is to show that the statutory fault not only did not, but could not possibly have, caused collision. The Pennsylvania, *supra*. That heavy burden cannot be met here.

The Cargo was entitled to a decree, and the cause is accordingly reversed and remanded for other and not inconsistent proceedings.

REVERSED AND REMANDED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By s Clara R. James
Deputy

New Orleans, Louisiana JUN 22 1959

(SEAL)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JUDGMENT.

Extract from the Minutes of August 1, 1958.

No. 17042

O Y FINLAYSON-FORSSA A B; FINSKA SJOFORSAKRINGS AKTIEBOLAGET, ET AL.

versus

PAN ATLANTIC STEAMSHIP CORPORATION, claimant of the SS ANTINOUS, and DET FORENEDE

DAMPSKIBSELSKAB A S, claimant of the M V ARGENTINA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and it is hereby, remanded to the said District Court for other and not inconsistent proceedings in accordance with the opinion of this Court.

It is further ordered and adjudged that the appellees, Pan Atlantic Steamship Corporation, claimant of the SS Antinous, and Det Forenede Dampskibselskab A S, claimant of the M V Argentine, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX E

ORDER STAYING MANDATE FILED: June 18, 1959.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17042

O Y FINLAYSON-FORSSA A B; FINSKA SJOFOR-

SAKRINGS AKTIEBOLAGET, ET ALS,

Appellant,

versus

PAN ATLANTIC STEAMSHIP CORPORATION, claimant of the SS ANTINOUS, and DET FORENEDE DAMPSKIBSELSKAB A S, claimant of the M.V ARGENTINA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellee, Pan Atl. SS Corp. in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellee, etc. to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of 90 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 18th day of June, 1959.

/s/ JOHN R. BROWN
United States Circuit Judge.

APPENDIX F

33 U.S.C. Section 192—

"Speed in fog, etc. (Art. 16)

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. June 7, 1897, c. 4 § 1, 30 Stat. 99."

APPENDIX G

CODE OF FEDERAL REGULATIONS

REGULATIONS OF CORPS OF ENGINEERS, U. S. ARMY

"§ 202.195 *Mississippi River below Baton Rouge, La., including South and Southwest Passes*"

. . . . . .

"(b) *The Regulations*"

. . . . . .

"(4) The masters and pilots of all seagoing steamers, tugboats and other vessels passing the explosive anchorage shall regulate the speed of their vessels over the bed of the river so as not to exceed seven miles per hour going downstream or

five miles per hour going upstream whenever any vessel is anchored or moored within the explosives anchorage and engaged in handling explosives."

APPENDIX H

CODE OF FEDERAL REGULATIONS

U. S. COAST GUARD—ANCHORAGE AND NAVIGATION REGULATIONS: ST. MARYS RIVER, MICHIGAN (REVISED)

"§ 92.23 *Definitions.*"

. . . . . .

"(b) Speed limits established in this part are expressed in terms of statute miles per hour over the ground."

. . . . . .

"§ 92.49 *Speed limit between Everens Point and Big Point.* (a) Except as modified by paragraph (c) of this section, and §§ 92.51, 92.53 and 92.55, a vessel of 50 gross tons or over shall at no time exceed a speed of 12 statute miles per hour over the ground between the following points in the St. Marys River:"

. . . . . .

"(b) Subject to the limitation of § 92.65, vessels of 50 gross tons or over may proceed at a speed of not over 15 statute miles per hour over the ground in the following sections of the St. Marys River:"

. . . . . .

FILED
SEP 22 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~335~~ 355

PAN ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

versus

O Y FINLAYSON-FORSSA A B; FINSKA SJOFOR-SAKRINGS AKTIESBOLAGET, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 335

PAN ATLANTIC STEAMSHIP CORPORATION,

Petitioner,

versus

O/Y FINLAYSON-FORSSA A/B; FINSKA SJOFOR-SAKRINGS AKTIESBOLAGET, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

This action arises out of a collision which occurred between the petitioner's vessel, the "ANTINOUS", and the "ARGENTINA" on the Mississippi River, below New Orleans, in a dense fog on April 10, 1952. Both vessels and the cargo laden on board the "ARGENTINA" sustained damage. Fortunately, none of the passengers or members of the crew on either vessel were injured.

The Proceedings in the Court Below

This action was commenced by the owners and underwriters of the cargo laden aboard the "ARGENTINA", which sustained severe damage as a result of the collision, against the "ANTINOUS" and against her owner, Pan-Atlantic Steamship Corporation. Pan-Atlantic Steamship Corporation, the petitioner

herein, impleaded the "ARGENTINA". Det Forenede Dampskibselskab A/S, claimant of the "ARGENTINA", after entering into a written agreement with the petitioner herein, Pan-Atlantic Steamship Corporation, admitted in its answers to the libel and impleading petition of Pan-Atlantic Steamship Corporation that the "ARGENTINA" was solely at fault for the collision. This admission was not binding upon the respondents herein and was not a true reflection of the merits of the case. It was a mere procedural device entered into between the petitioner and the owners of the "ARGENTINA" to further their financial interests to the detriment of the respondents. This admission was characterized by the Court of Appeals for the Fifth Circuit as "spurious", "not a judicial admission freely made", "a tails-you-lose—heads-I-win settlement * * *" (Pet. App. p. 45).

The case was tried in December 1955. In June 1957, approximately a year and a half after the trial, the Trial Court, without having rendered an opinion either written or oral and without having made any findings of fact or conclusions of law, issued a decree in the form of a minute entry, dismissing the libel and dismissing the impleading petition. Thereafter counsel for the petitioner, the owner of the "ANTINOUS", at the request of the Trial Court submitted findings of fact and conclusions of law which were then adopted by the Trial Court substantially *in toto*.

It is implicit in the opinion of the Court of Appeals that the findings of fact and conclusions of law prepared by counsel for the petitioner were formulated on the basis of "advocacy" rather than testimony (Pet. App. pp. 41, 42 and 44). The Court of Appeals for the Fifth Circuit did not reverse the findings as

clearly erroneous because, in the Court's opinion, there was no need to do so. The Court said:

> "* * * we may accept the fact findings although we confess that were we unable to place our decision on the one principal point we would be hard put to accept several of them." (Pet. App. p. 35)

Respondents herein, the owners and underwriters of the cargo laden on the "ARGENTINA" were the only parties to appeal from the decision of the District Court. Hence, the only question presented on appeal was whether any faults or errors in the navigation of the "ANTINOUS" caused or contributed to the collision. The Court of Appeals for the Fifth Circuit held that the "ANTINOUS", on the basis of her own testimony, the testimony most favorably disposed to her, was proceeding at a "plainly immoderate" rate of speed (Pet. App. p. 47) in violation of Article 16 of the Inland Rules of the Road (33 U. S. C. Sec. 192), which reads as follows:

> "Speed in fog, etc. (Art. 16)
>
> Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over. June 7, 1897, c. 4 § 1, 30 Stat. 99."

The Questions Presented

The questions presented are not those set forth by the petitioner for the following reasons:

1. The Court Below did not hold that "* * * sole relevant speed to be considered in applying the Rules of Navigation" was "speed through the water" (Pet. App. p. 2).

The Court Below specifically said:

"We think it would be unwise here precisely to chart the circumstances and the extent to which tide or current is or is not to be taken into account in computing moderate speed in fog situations." (Pet. App. p. 50)

2. The Court Below did not hold that the petitioner's vessel was at fault for failure to "* * * plan her maneuvers exclusively with respect to an unseen, unheard and unknown vessel approaching at an admittedly grossly excessive speed * * *". (Pet. App. p. 3)

The Court Below said:

"Without a doubt the circumstances called for the application of the traditional rule of sight by which the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility. The Tug Percheron, 5 Cir., 246 F. 2d 135, 1957 AMC 1941; The Nacoochee, 137 U. S. 330, 339, 34 L. ed. 687, 690; The Umbria, 166 U. S. 404, 417, 41 L. ed. 1053, 1060; Griffin on Collision, p. 288-296. In this area the Mississippi River was a busy artery in which

many vessels upbound, downbound and at anchor might be expected. The hazard of proceeding on was demonstrated by the contemporaneous decision of two other ascending vessels to come to anchor near the West bank and the determination by the ANTINOUS Pilot and Master to do the same." (Pet. App. p. 47).

and further said:

"The test of moderate speed is stated in terms of being able to stop within one-half of the distance separating the two vessels assuming the other is likewise proceeding at moderate speed." (Pet. App. p. 51).

3. Under the facts of this case, petitioner's vessel, the "ANTINOUS", was never adrift with the current but actually had substantial headway even at the moment of the collision.

The Court of Appeals for the Fifth Circuit said:

"On her own most favorable testimony, we do not quite see how the Court could find that the ANTINOUS was stopped and making sternway." (Pet. App. p. 51)

Petitioner's contention that the holding of the Court of Appeals for the Fifth Circuit presents an impossible navigational requirement finds no support in the record. The "ANTINOUS" has not been found at fault for a speed which slightly exceeded 3.1 knots, nor has the "ANTINOUS", been found at fault for proceeding "at *any* speed at which she could make headway" (Pet. App. p. 9). She has been found at fault because she admitted a speed through the water

of 7.1 knots and because the Court of Appeals considered the record replete with evidence indicating that her actual speed through the water was substantially in excess of her admitted speed.

Consequently, the three questions presented by the petitioner herein are not appropriately before this Court under the law or the facts of this case.

As we view it, the only question presented is whether or not, under the facts and circumstances of this particular collision, the Court of Appeals for the Fifth Circuit was correct in holding that the "ANTINOUS" was at fault for proceeding at a "plainly immoderate" rate of speed under the conditions of fog and limited visibility which prevailed.

The Case

Petitioner has failed to state the basic facts of this case which must be understood before the legal argument can be evaluated.

The "ANTINOUS" was proceeding at full speed up the Mississippi River bound for New Orleans. As the vessel was approaching Searsdale Light, which is located about 20 miles below New Orleans, her navigators observed a dense bank of fog ahead extending diagonally across the river. Two other vessels which were also proceeding upstream, a short distance ahead of the "ANTINOUS", upon seeing the fog, altered course toward the west bank and anchored for the reason that their navigators considered it too hazardous to proceed. The "ANTINOUS", instead of anchoring, elected to proceed into the dense fog and into an

area which, according to the testimony of her own officers was dangerous and the main traffic area for downbound vessels (Pet. App. p. 45).

The fog which the "ANTINOUS" elected to enter almost destroyed visibility. According to her own witnesses, visibility was limited "to 500 feet, maybe" (Pet. App. p. 43), "at the most a ship length" (Pet. App. 44). Navigating conditions demanded vigilant precaution and yet the "ANTINOUS" continued on in this blinding fog without the benefit of radar with her engines at half speed ahead.

The Trial Court, based solely upon a theoretical mathematical formula, utilizing the pitch of the vessel's propeller, revolutions per minute and the estimated slip, found that the "ANTINOUS" was proceeding at a speed of 7.1 knots through the water. The Court then deducted therefrom the velocity of the current which it found to be 4 knots to arrive at the vessel's speed over the ground (Pet. App. p. 48). The velocity of the current was never measured and is a mere approximation. Even at this speed, witnesses who testified for the petitioner admitted that the "ANTINOUS" could not be brought to a stop within the full limit of visibility, to say nothing of one-half thereof. Actually, using times and distances testified to by the officers of the "ANTINOUS" and set forth in that vessel's log and in the petitioner's pleadings, the "ANTINOUS" was making a speed of 4.8 to 5.8 knots over the ground. Assuming a 4 knot current, this would give the "ANTINOUS" a speed of 8.8 to 9.8 knots through the water (Pet. App. pp. 48, 49).

Safety demanded that the "ANTINOUS" should have anchored as did the other two vessels or that she

proceed at a speed which would permit her to come to a stop before colliding with another vessel which was proceeding at a moderate rate of speed. The "ANTINOUS" did neither.

While the "ANTINOUS" was proceeding in this dense fog with her engines still half ahead, her lookout heard fog signals sounded by an unseen downbound ship from a position one and a half points off her port bow (Pet. App. p. 43). The second section of Article 16 of the Inland Rules of the Road makes it mandatory for a vessel to stop her engines when hearing a signal from an unseen ship forward of her beam. Admittedly, the "ANTINOUS" did not stop upon hearing this signal but continued on without even reducing speed.

Thereafter, the navigators of the "ANTINOUS" heard a two blast signal sounded by the "ARGENTINA" at a time when that vessel was not in sight. The deck log and bell book of the "ANTINOUS" establish that again she failed to stop her engines in contravention of the provisions of Article 16 of the Inland Rules of the Road (Pet. App. pp. 41-42).

About a minute later, the "ARGENTINA" came into view about a ship length away, one and one-half points off the "ANTINOUS" port bow, the same bearing from which fog signals had previously been heard (Pet. App. p. 43). The engines of the "ANTINOUS" were then belatedly ordered full astern but it was then too late to stop her forward momentum. "* * * on her own story put forward most favorably to her, the "ANTINOUS" had effective emergency full astern on her propeller for 20 seconds" prior to the collision

(Pet. App. p. 50). The stem and bow of the "ANTINOUS" penetrated nine feet into the starboard side of the "ARGENTINA", opening a gash in her steel shell plates which extended from below the water line to the weather deck (Pet. App. p. 39).

ARGUMENT

I.

In the case before the Court, the Court of Appeals for the Fifth Circuit said:

> "The test of moderate speed is stated in terms of being able to stop within half of the distance separating the two vessels, assuming the other is likewise proceeding at moderate speed." (Pet. App. p. 51).

The language used by the Court Below is taken almost verbatim from a decision of this Court in the case of *The Umbria*, 166 U. S. 404, at p. 417:

> "The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill, until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway."

Practically the same language was used by this Court in the case of *The Nacoochee*, 137 U. S. 330, p. 339, and in the case of *The Chattahoochee*, 173 U. S. 540, p. 548.

To the same general effect, see:

The Pennsylvania, 86 U. S. 125;
P. R. R. No. 5, 181 Fed. 833;
The Manchioneal, 243 Fed. 801;
The Etruria, 147 Fed. 216;
Steffens v. United States, 32 F. (2d) 206;
Union Steamship Company of New Zealand v. Standard Oil Company of California, 60 F. (2d) 538, 1945 A. M. C. 509;
The Silver Palm, 94 F. (2d) 754, Cert. den. 304 U. S. 576;
Tug Percheron, etc. and Cornelius Kroll Company v. Alabama Transit Company, 246 F. (2d) 135.

The Court of Appeals, using the test which this Court formulated and which is universally applied by the Trial and Appellate Courts of this country, held that upon the evidence most favorable to the "Antinous", the vessel was proceeding at a "plainly immoderate" rate of speed (Pet. App. p. 47).

Petitioner asserts that the decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the decision of the Court of Appeals for the First Circuit in the case of *Gertrude Parker, Inc. v. Abrams*, 178 F. (2d) 59, with the decision of the Court of Appeals for the Second Circuit in the case of *Polarus Steamship Co. v. T. S. Sandefjord*, 236 F. (2d) 270, and with the decision of the Court of Ap-

peals for the Ninth Circuit in the case of *The Diamond-Indiana*, 14 F. (2d) 923. The assertion is without foundation.

In each of the above cases, the collision occurred on the open sea; the vessel which was exonerated was proceeding either at a very slow rate of speed or was stopped at the time of the collision. In each of the cases, the navigators of the exonerated vessel had no knowledge of the presence of other vessels in the vicinity.

In the case herein, the "ANTINOUS" was proceeding in an area in the Mississippi River which was "a busy artery in which many vessels, upbound, downbound and at anchor might be expected" (Pet. App. p. 47). In the case herein, the "ANTINOUS" was proceeding in a dense fog with her engines at half ahead, making an admitted speed of 7.1 knots through the water and 3.1 knots over the ground and an actual speed as testified to by her own witnesses of from 8.8 to 9.8 knots through the water and 4.8 to 5.8 knots over the ground. Even the admitted speed can hardly be considered as moderate in view of the surrounding circumstances.

In all three of the cases cited by the petitioner, it was recognized that the rule of sight formula laid down by this Court in *The Umbria* (supra) and followed by the Court of Appeals for the Fifth Circuit in this case would have been applied if the collision had taken place in a harbor or busy estuary, such as the Mississippi River rather than on the open sea. In fact, under circumstances similar to those presented in the case herein, the Courts of Appeals for

the First, Second and Ninth Circuits have applied the same rule which the Court of Appeals for the Fifth Circuit applied in the present case.

In the case of *The Goldshell-White Plains* (CA 2, 1955) 222 F. 2d 75, which involved a collision which occurred in New York Harbor during a dense fog, Judge Learned Hand held that the "WHITE PLAINS", which was proceeding at a speed of from 3 to 3½ knots through the water and 1½ to 2 knots over the ground, was at fault for violating Article 16 of the Inland Rules of the Road, in that she was proceeding at an immoderate rate of speed. The Court said at page 77-78:

> "Although Article 16 only requires a vessel in a fog 'to go at a moderate speed,' as everybody knows, the courts have imposed a gloss upon this that 'moderate speed is that at which, if the other vessel also does her duty, the vessel will be able to stop her way before they collide.' So far as appears, neither vessel needed the speed at which she was moving in order to keep steerageway; and, if she chose not to anchor, as it was not unlawful to do, we cannot say that she could not have reduced still further. In any event since neither did reduce to the speed that would have enabled her to conform to the law, she was in duty bound to prove that it was impracticable to do so."

To the same effect, we call the Court's attention to the case of *The Sagamore*, 247 Fed. 743, decided by the Court of Appeals for the First Circuit, and the case of *The Belgian King*, 125 Fed. 869, cert. denied 193 U. S. 669, decided by the Court of Appeals for the Ninth Circuit.

II.

The Court of Appeals for the Fifth Circuit held that under the facts and circumstances of this particular collision, the relevant speed to be considered in applying the test of moderate speed as laid down by this Court in the case of *The Umbria* (supra) is speed through the water.

The holding of the Court Below is directly in accord with the decision of the Court of Appeals for the Second Circuit in the case of *A. H. Bull Steamship Co.* v. *United States*, 34 F. (2d) 614, wherein the Court said at page 616:

> "A tide makes no difference in the approach of two vessels, which are both floating in it; it is apparent from a moment's consideration that the acceleration of one is exactly balanced by the retardation of the other, and that when both have seaway the current cannot play any part in the collision."

It follows the decision of Judge Learned Hand in the case of *The Goldshell-White Plains* (supra), rehearing 224 F. 2d 86, in which the Court said at page 87:

> "* * * speed through the water * * * is all that counts."

To the same effect see *The Lillian Anne-Pennsylvania*, 1934 A. M. C. 569 (not otherwise reported), cert. denied 293 U. S. 569, and *The Yarmouth*, 100 F. 667.

In *A. H. Bull Steamship Company* v. *United States* (supra), the collision occurred in New York harbor.

In *The Lillian Anne-Pennsylvania* (supra), the collision occurred in the Delaware River, where the current runs at least at a speed of 3½ knots, equivalent to the conditions encountered by the "ANTINOUS"-"ARGENTINA" in the Mississippi River. In *The Goldshell-White Plains* (supra), the collision occurred in the Hudson River and in *The Yarmouth* (supra), the collision occurred in a channel in Boston Harbor.

The Courts of England have reached the same conclusion. In *Marsden's Collision at Sea*, 10th Ed. pages 479, 480, it is said:

> "As regards danger to vessels at anchor, the speed of the other ship over the ground, and not through the water, is that which must be considered; and in such cases the strength and direction of the tide must be taken into account. As regards danger to vessels under way the tide is immaterial."

The holding of the Court Below, contrary to the statements contained in the petition herein, is not in conflict with any of the decisions of this Court or of any other Court, nor is it in conflict with the regulations of any Governmental agencies. The cases of *The Plymothian*, 168 U. S. 410, the *Societa Anomic Navigazione Alta Italia* v. *Oil Transfer Co.*, 232 F. (2d) 422, and *The Kristen Miles*, 52 F. (2d) 502, did not involve collisions in fog. Hence, the question of the interpretation of moderate speed under the provisions of Article 16 of the Inland Rules of the Road was not before the Courts.

The Court Below specifically said that its decision in *The Sylvanus*, 66 F. (2d) 113, was not to the contrary (Pet. App. p. 51). The case of *Panama Trans-*

port Co. v. United States, 102 F. Supp. 958, involved a collision with a vessel at anchor and therefore speed over the bottom was the determining factor.

The regulations of the Corps of Engineers appearing in 33 C. F. R. Section 202.195 (b) and of the United States Coast Guard appearing in 33 C. F. R. Sections 92.23 (b), 92.49 (a), 92.49 (h), which appear as Appendices G and H of the petition, do not concern Rule 16 of the Inland Rules of Navigation, do not pertain to navigation in a fog or other conditions of limited visibility, and are in no way affected by the decision in this case.

Actually, the rule as formulated presents an alternative to the navigators of vessels proceeding in a dense fog, such as that encountered by the "ANTINOUS". The ship must either proceed at a rate of speed which would enable her to stop within half the limit of visibility or come to anchor.

In the *Lillian Anne-Pennsylvania* (supra) the Court said at page 571:

> "But there are situations in which a vessel *overtaken by a fog* and breasting a swift current, tidal or other, cannot safely allow herself to drift back. Her situation is not unlike that of a vessel which cannot at once maintain steerageway and keep her speed down to that which the visibility demands, and which ought ordinarily to anchor, especially if in a thoroughfare. Pennsylvania, 86 U. S. 125, 134; H. F. Dimock, 77 Fed. 226, 229 (1 CCA); Sagamore, 247 Fed. 743, 746-752. (1 CCA). It seems to us that a vessel in a narrow channel which cannot hold

her own against the current without too much speed for the existing visibility, and which cannot safely drift back, should also anchor."

To the same effect, see the case of the *Panama Transport Co.* (supra) at page 961, and *The Goldshell-White Plains*, 222 F. 2d 75, at page 78.

In the case herein, two other vessels which preceded the "ANTINOUS" upstream, upon seeing the fog bank ahead, altered course toward the west bank and anchored. Only the "ANTINOUS" elected to carry on. Once she entered the dense fog, she did not proceed at bare steerageway, but kept her engines at half ahead. She was proceeding at a rapid rate of speed, both over the ground and through the water in an area which her navigators knew was the main path for downbound vessels. Her actual speed of from 4.8 to 5.8 knots over the ground, or even her admitted speed of 3.1 knots is sufficient to convict her of violating Article 16 of the Inland Rules of the Road, *The Goldshell-White Plains* (supra).

To the same effect, see

The Bayonne, 213 Fed. 216;
P. R. R. No. 466, 8 F. Supp. 327;
The Martello, 153 U. S. 64;
The W. A. Luckenbach, 14 Fed. (2d) 100, 1926 A. M. C. 1281;
The Manager, 1930 A. M. C. 347 (not otherwise reported);
The Pennland, 1934 A. M. C. 1332 (not otherwise reported);
The Kiddo, 39 F. Supp. 735, 1941 A. M. C. 1790.

In view of the fairly recent collisions between the "ANDREA DORIA"-"STOCKHOLM", the "CONSTITUTION"-"JALANTA" and the "SANTA ROSA"-"VALCHEM", all involving collisions in a fog, we submit that the interpretation of moderate speed, as set forth in Article 16 of the Inland Rules of the Road should not be tempered but on the contrary, if anything, should be made more stringent.

Conclusion

The decision of the Court of Appeals for the Fifth Circuit which this Court is asked to review does not formulate any new or novel law. It is not in conflict with any decision of this Court or of any other Court. The issue presented by the petitioner does not affect any large segment of the population. In fact, it is of importance only to the litigants herein.

It is respectfully submitted, therefore, that the decision of the Court of Appeals for the Fifth Circuit was correct and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 355

PAN ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

versus

O/Y FINLAYSON-FORSSA A B; FINSKA SJOFORSAKRINGS AKTIESBOLAGET, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER.

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HAUSER PRINTING CO., INC., NEW ORLEANS

Supreme Court of the United States

OCTOBER TERM, 1959

No. 355

PAN ATLANTIC STEAMSHIP CORPORATION,
Petitioner,

versus

O/Y FINLAYSON-FORSSA A/B; FINSKA SJOFOR-SAKRINGS AKTIESBOLAGET, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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May It Please the Court:

Petitioner submits this additional brief reluctantly, since it is Petitioner's feeling that the original Petition for a writ of certiorari adequately and accurately states the true issues. Nevertheless, the Brief of Respondents in opposition to the Petition for certiorari has injected at least two issues not entirely germane, but apparently designed to influence the Court against the granting of

the writ by statements which Petitioner submits are, at best, misleading.

First, the suggestion is made by Respondents that the trial Court (whose careful and extensive Findings of Fact were largely ignored by the opinion of the Court of Appeals) kept the case under advisement for a period of a year and a half, and, therefore, the Court of Appeal was justified in ignoring these findings despite the decision in *McAllister v. U. S.*, 348 U.S. 19 (1954).

The actual facts are that at the conclusion of the trial on December 15, 1955, counsel for damaged cargo (Respondents here), with approval of counsel for the ANTINOUS (Petitioner), suggested to the trial judge that in lieu of argument at that time, the entire record should be written up by the reporter with privilege of any party to file briefs with reference to the written record (R. 921, 922). This was consented to by the trial Judge (R. 922) but there is certainly nothing in or out of the record which indicates that the Court was not at that time fully prepared to render judgment if the case had been then submitted. It took the Court Reporter until January 26, 1956, to transcribe the record consisting of some nine hundred forty-seven (947) pages. Several months thereafter **printed** Briefs were filed by the parties; that on behalf of the cargo Libellants (Respondents here) on or about April 1, 1956, and that on behalf of the ANTINOUS' owner (Petitioner here) on May 10, 1956. Some months later on September 4, 1956, cargo Libellants (Respondents) filed a printed Reply Brief and on or about December 20, 1956, Petitioner here filed its printed Reply Brief. On January 16, 1957, it was decided in conference with the District Judge that arguments would not then be presented by counsel. On

February 4, 1957, cargo Libellants (Respondents) filed by letter to the Judge a Reply Memorandum to Petitioner's Reply Brief of December 20, 1956. All of these briefs were filed within certain specified periods of time fixed by the Court but extended on application of the parties from time to time with the result that the final reply brief was not filed with the Court until more than one year had elapsed from the time of the trial. Under the circumstances, it is small wonder that the District Court did not enter its Findings of Fact and Conclusions of Law until more than a year and a half after the actual trial of the case (R. 930). The case was being argued in detail by brief for more than a year of this time. The inference injected by Respondents that the facts were dormant in the mind of the trial judge during the interval between the trial and the entry of the decree is completely unwarranted. On the contrary, if any inference is to be drawn, it is that the facts were receiving the most thorough consideration possible during the time the case was under submission. Respondents' assertion that the Findings of Fact of the District Court were formulated on the basis of advocacy rather than testimony is not substantiated; at the time the findings were entered, the trial judge had before him the entire printed record of the testimony he heard in open court. Had the Court of Appeals followed the mandate of *McAllister v. U. S.*, *supra*, there was no alternative but to affirm the judgment of the District Court.

The second point requiring reply is Respondents' reference on Page 2 of their Brief to the judicial admission on the part of the ARGENTINA that the collision was entirely caused by her own negligence as having been characterized as "spurious" by the Court of Appeals. Respondents' Brief then quotes certain excerpts

from the opinion of the Court of Appeals dealing with this aspect of the case. The full pertinent part of the opinion of the Court of Appeals reads as follows:

> "And perhaps strangest of all was the judicial admission by the ARGENTINA that she was solely at fault and the ANTINOUS free from fault. For this admission was spurious, not in the moral sense, but in the legal sense. No disparagement of motive or conduct by parties or counsel is made or intended. On the contrary, settlements are to be encouraged and this one certainly reflects the consummate skill of the ARGENTINA's proctors who, as articulate craftsmen, had much reason to be pessimistic about the case as a whole which included not only Cargo's substantial claim **but extensive claims by both vessels for collision damage.** But in that setting, this was not a judicial admission freely made. It was a tails-you-lose-heads-I-win settlement made prior to the filing of the ANTINOUS 56th Rule petition for Impleader and ARGENTINA's sworn answer to that petition and to the original Cargo libel. By making the settlement, **the ARGENTINA gave up nothing.** She knew she could never escape a finding of partial fault. She knew she could never fasten sole fault on the ANTINOUS. The most she could hope for was a mutual fault decree. She knew that if she did so, she would find herself paying one-half of her own cargo's losses under the now familiar principles even though she had no direct liability to Cargo under the Carriage of Goods by Seas Act, 33 U.S.C.A. 1300-1315. To admit sole fault and withdraw her strength from the side of her Cargo with whom, as an ally, she had been making common and vigorous cause up to date, might eliminate that risk altogether, especially so since, as the agreement permits, if this tactical maneuver were to fail in its objective, the ARGENTINA could still have all she would

have ever gotten. It was an admission of fault only so long as it worked." (Emphasis ours)

The emphasized portion of the Court of Appeals' opinion was completely dehors the record and was incorrect. By stipulation the case in the District Court was tried on the issue of liability *vel non* and the question of damages and proof thereof were not an issue. The statement by the Court of Appeals that there were "extensive claims by both vessels for collision damage" finds no support whatever in the record, and indeed could not because of the bare fact that the damages to the ANTINOUS were insignificant in comparison to the very heavy damage to the hull and equipment of the ARGENTINA. The ANTINOUS did not even require temporary repairs in order to continue to sea. By making a judicial admission of sole fault, the ARGENTINA gave up, or at least did all she could judicially do, to give up, her right to recover from the ANTINOUS at least one-half of the very substantial damages the vessel itself sustained without regard to Cargo's loss. The Court of Appeals was in error **in assuming** that the ANTINOUS was extensively damaged when such was not the fact and was not supported by the record. This patent error on the part of the Court of Appeals was the underlying foundation of its reference to the agreement as being "spurious".

For the reasons set forth in its original Petition and for the foregoing reasons it is respectfully submitted that a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed and the decree

of the District Court should be reinstated.

Respectfully submitted,

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